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Supreme Court of the United States

OCTOBER TERM, 1937

No. 819

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR OF THE ESTATE OF MARY T. RYAN, DECEASED, PETITIONER,

vs.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA

PETITION FOR CERTIORARI FILED FEBRUARY 21, 1938.

CERTIORARI GRANTED MARCH 28, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1937

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INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MARCH 31, 1938.

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IN SUPREME COURT OF APPEALS OF VIRGINIA, AT STAUNTON

MARY T. RYAN, Plaintiff in Error,

v.

COMMONWEALTH OF VIRGINIA, Defendant in Error.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS

To the Honorable Justice and Associate Justice of the Supreme Court of Appeals of Virginia:

Your petitioner, Mary T. Ryan, would respectfully show that she is greatly aggrieved by a final order of the Circuit Court for the County of Nelson, Virginia, entered on the 9th day of November, 1936, in the proceedings at law pending in said Court under the style of Mary T. Ryan v. Commonwealth of Virginia.

The Facts

The proceeding in question was a proceeding by way of application for a refund of income taxes paid to the State of Virginia on assessment made against the petitioner for the years 1931, 1932 and 1933, and which were paid by petitioner under protest, the said taxes aggregating the sum of $8,996.46. The said tax was assessed on income received by the said Mary T. Ryan during the three years in question from Trustees under a trust set up under the will of Thomas F. Ryan, a resident of the State of New York. The [fol. 2] questions raised are questions of law under the agreed statement of facts, the same questions applying to the whole of the tax assessed for the three years.

The facts are agreed and will be found set out in the "Stipulation of Facts" and exhibits filed as part of the record. The facts are simple and need not be repeated here. We call attention, however, to the following points:

1. That the additional tax assessed by the State and to which objection was made, was a tax on sums paid to Mary T. Ryan, a resident of Virginia, by the Trustees under the will of Thomas F. Ryan, a resident of New York.

2. That the trust from which the sums were paid is a New York trust; originating under the will of a resident of

New York; established under the laws of New York; managed and controlled by the proper court for the State of New York; the assets are all kept in New York; and the Trustees are residents of New York. In short, it is entirely a New York trust, and subject to the laws of that State.

3. The trustees under the laws of New York pay, and have paid yearly a state income tax on the total Mary T. Ryan income from the trusted estate, the assessment being made under Section 365 of the New York Tax Code, which to all intents and purposes is identical with Section 50 of the Virginia Tax Code, dealing with tax on estates and trusts, practically the only difference between the two being the necessary difference in references.

4. There was no wilful failure or refusal of the petitioner to furnish a list of her property or income to the tax authorities.

5. The amounts paid to the petitioner were paid by the Trustees under Article IV; Section F, of the will of Thomas F. Ryan. The will divides the estate in the hands of the Trustees into fifty-four equal parts, and provides that the Trustees should pay to petitioner during her life such part of the income from twelve of said equal parts as they in their sole discretion may determine to be necessary and proper for her care, support, and comfort, in such installments and at such intervals as they in their sole discretion may determine. Provision is made for the residue of said income not so used, and for the disposition of the principal at the death of the petitioner, which is not involved in this proceeding.

6. The additional tax assessed for the years 1931, 1932, and 1933, and aggregating $8,996.46, was assessed on ac- [fol. 3] count of these payments made by the Trustees, and which had not been included by petitioner in her returns for the years in question as income subject to taxation.

7. The tax has been paid by petitioner under protest, and this proceeding is to correct the alleged erroneous assessment.

8. The tax as assessed was fixed after proper deductions as provided by Section 25 of the Virginia Tax Code.

9. It is stipulated as a fact that petitioner has filed her income tax report with the United States Government for

Federal income tax returns for each of the years in question, and has included in such returns the amounts paid to her by the Trustees, without protest, and with no application for correction. Objection is made, as provided in the "Stipulation of Facts" to the relevancy and pertinency of this fact, on the ground that it is immaterial. What has been done with reference to the returns to the Federal Government under the Federal Statute has no bearing on the question here. The question is simply whether the sums paid to Mrs. Ryan from the trust are taxable as income under the Virginia Statute. Under the Federal law, the income of a discretionary trust is taxed directly to the trustees, to the extent that it is not distributed to the beneficiary, or to the beneficiary to the extent that it is distributed. The Virginia State taxes the income of a discretionary trust directly, and only to the trustees, regardless of distribution.

10. It is also admitted in the "Stipulation of Facts" that the Trustees made regular Federal returns, and in which returns the payments made to the said Mary T. Ryan are shown, and it is left to her to report such payments to her in her Federal returns, which was done. The same objection on the same grounds is made as to the relevancy or materiality of this admission of fact.

Assignment of Error.

Petitioner assigns as error the refusal of the Court to correct the alleged wrongful assessment, and to direct that there be repaid to the petitioner the amount wrongfully collected from her.

Questions Before the Court

The questions raised in the petition and now relied on are two in number, and which will be discussed in order.

[fol. 4] First. The sums paid to the petitioner by the New York Trustees of the New York trust were not properly taxable to Mary T. Ryan under the Virginia laws.

Second. If the statute be construed to make the income taxable in Virginia, it would be unconstitutional under the Fourteenth Amendment to the Federal Constitution.

First. Were the Payments by the Trustees Subject to the Income Tax Under the Laws of the State of Virginia?

In discussing this question, it will be necessary to consider the following points:

(A) Was the tax in the instant case authorized under the provisions of the Virginia tax law?

(B) It will be necessary to discuss, in considering question (A) the obvious purpose of the Virginia tax law, as shown in its various provisions to prevent double taxation on income, such as would necessarily exist if the contention of the State here should be upheld.

All italics in this Note are supplied.

(A) Was the tax in the instant case authorized under the provisions of the Virginia tax law?

The Virginia statutes classify taxpayer for the purpose of income taxation under separate and distinct headings of (1) Individuals; (2) corporations and partnerships; and (3) estates and trusts. Sections 50 and 51 of the tax law deal with income tax on estates and trusts, and specifically impose taxes on the entire income of a discretionary trust against the Trustee, and not against the beneficiary. The pertinent provisions of Sections 50 and 51 are as follows:

"Sec. 50. Estates and trusts.—1. The tax imposed by this chapter upon individuals shall apply to estates and trusts, which tax is hereby levied annually upon and with respect to the income of estates or of any kind of property held in trust, including:"

"d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals * * *:"

"3. In cases under paragraphs a, b, and c of sub-[fol. 5] division one, of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, except (exceptions not pertinent). * * * In such cases, the estate or trust shall be allowed the same exemption as is allowed to single persons by this chapter; and in such cases an *estate or trust created by a person not a resident*, and an *estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under this chapter.*

"4. In cases under paragraphs d and e of subdivision one of this section, if the distribution of income is *in the discretion of the fiduciary,* either as to the beneficiaries to whom payable or as to the amounts which any beneficiary is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credited to any such beneficiary * * *."

Section 50 of the Tax Code is identical in all respects, except necessarily in the references, to Section 365 of the New York tax law. Sub-section d of sub-division 1 and sub-division 4 are the specific provisions for tax on income to be distributed periodically, and where the amount of distribution is discretionary with the fiduciary either as to beneficiaries or amounts, and therefore cover cases such as the one at bar. It is to be noted that in Virginia (as in New York) the income tax on a discretionary trust is paid by the *fiduciary* for the *whole* income from the trust and no beneficiary is directly assessed thereon—thus providing for one state tax and only one on the same subject. This is further reinforced by the provisions of sub-section 3, where it provides that in case of a trust created by a non-resident, it shall be taxed "only to the extent to which individuals other than a resident are taxable" i. e.—only on income from Virginia sources.

It will be noted that there is no distinction in the statutes between a resident and a non-resident trust. The statutes having provided for the taxation of income of trust to the Trustee, it is not competent for the tax authorities to disregard the classification of the statutes and attempt to tax the income from the trust to an individual as individual [fol. 6] income. The fact that the trust is a non-resident trust is a mere circumstances and cannot change the law. In fact, sub-section 3, of section 50, specifically shows the intent of the Legislature that the section is to govern both resident and non-resident trusts, in that it provides that the income on trusts created by a non-resident is to be "*subject to tax only to the extent to which individuals other than residents are liable to under this chapter.*" This part of sub-division 3 is made applicable by sub-division 4, and makes trustees of non-resident trusts taxable only to the

extent to which an individual other than a resident would be taxable, and thus would make trustees of a non-resident trust (as in the case at bar) taxable on the income of such trust only to the extent that they receive income from property owned and from business, trade, or profession or occupation carried on in Virginia. (See Tax Code, Section 38.)

It is a principle too well established to need citation that "statutes laying taxes are strictly construed against the taxing power and are not to be extended beyond the clear import of the language used." U. S. v. Merriman, 44 Sup. Ct. Rep. 69, 68 L. Ed. 240. See also 25 R. C. L. 1090.

The Virginia Trust Income Tax Law (identical with the New York law as shown above) provides that in case of a discretionary trust such as this one, the income is to be taxed to the Trustee without deduction for the amounts distributed to the beneficiary. In other words, the tax is levied on the Trustee, and not on the beneficiary. The purpose of so levying the tax is explained by Mr. Justice Cardozo (then Judge of the Court of Appeals of New York) in People, ex rel., Bank of America, et al., v. Gilchrist, 244 N. Y. 56, 154 N. E. 821 (1926). In that case, in sustaining the constitutionality of substantially identical provisions of the New York Tax Law, Mr. Justice Cardozo said:

"* * * Public policy demands that the state shall know the income upon which its taxes are to be based. If the determination of the shares is left to the discretion of the trustees, there may be an indefinite period during which the interests of the beneficiaries will be left in suspense. The result, so far as the taxing authorities are concerned, will be [fol. 7] very nearly the same as if there were a trust for accumulation * * *."

"* * *

"The return day arrives. The trustee has paid a certain proportion of the income to one of the beneficiaries. He has not yet made up his mind as to the needs of the others. The beneficiaries cannot be taxed until his determination is announced. The only way to reach the income in the interval is to lay the tax upon the trust. In this particular case, the risk of delay or evasion may be slight, for here the trustees are directed to make their allotment annually. Even so, they might postpone the performance of their duty, and leave the basis of the tax uncertain. * * *

"Taken by and large, income presently appropriated to the use of beneficiaries is in a class separate and apart for purposes of taxation from income to be appropriated thereafter in the exercise of discretion. The Legislature did not exceed its power when it gave effect to the difference in the imposition of the tax."

Thus, it is clear that the purpose of a statute such as section 50 (4) of the Virginia Tax Code is to tax the income of a discretionary trust to the trustee and not to the beneficiary, to prevent the tax avoidance or delay which could be caused by the trustee's distributing at his will if the income were taxable to the beneficiary on distribution.

In some other states there are specific provisions taxing the resident beneficiary of a non-resident trust. See, for example, Section 62, Chapter 11, General Laws of Massachusetts, and also Hutchins v. Long, Com'r. (Mass.), 172 N. E. 605, 71 A. L. R. 677, 681. There is no such statute in Virginia. Had it been, the purpose of the Legislature to tax sums received from a non-resident trust, it would have adopted a statute for the purpose, as did the State of Massachusetts.

In the absence of any such specific provision in the Virginia tax law as to income, it seems clear that no tax can be levied on the income distributed to a resident beneficiary of a non-resident discretionary trust. The tax is to be levied on the trustee if such trustee has income from sources in Virginia.

In the instant case, the Trustees pay tax on the entire [fol. 8] income of the trust estate to the State of New York. It is true that Mrs. Ryan personally paid nothing to the State of New York, but amounts paid to her had already been subjected to tax under the New York trust income tax provision, which, as stated, is practically identical with the Virginia provision. It would seem to make little difference whether under the New York law the Trustees should be required to pay the tax, instead of requiring the Trustees to report and individuals to pay, from sources in the State of New York. The effect is the same. The tax has been placed on all the income of the trust estate.

It must be admitted that, under Section 39, if the New York Law, instead of placing the tax against the trust,

should place it against the individual, and then should collect the tax from Mrs. Ryan, on account of the amount received by her from sources in the State of New York (the New York trust), Mrs. Ryan would be entitled to the credit provided for in Section 39. Why should there be a different rule because of the fact that instead of collecting the tax directly from Mrs. Ryan, the State of New York collects it from Trustees? The effect is the same in either case. Why should Virginia discriminate against a resident merely on account of the method which the State of New York takes to collect the tax on the income from the trust, i. e., directly from the Trustees rather than from the beneficiary, when there is no real difference?

It is submitted that sections 50 and 51 cover the entire field for taxation on income from trusts and that such income can be taxed only under those sections; that the statute makes no distinction whether such income be from a trust of some other state or of Virginia; that the failure to make such distinction and failure to pass a statute as did other states to tax receipts from foreign trusts, is significant and controlling; that it is not competent for the Tax Commissioner to disregard the plain mandate of the Statute; and that any income tax on the subject here involved must be assessed against the Trustees as such. If there be no income from Virginia sources which can be taxed against the Trustees, there is no authority for assessment here at all.

When during his life time Mr. Ryan gave to Mrs. Ryan such sums as he thought proper for her maintenance, clearly it was not income to her nor taxable as such. If while alive he had set up a discretionary trust to provide the same maintenance the trust would pay the income tax on the assets instead of his paying it, and the result would [fol. 9] have been the same. So when the discretionary trust is set up in his will or continues after his death—the trustees pay the income tax and the result is the same. There is no change in effect in either case, whether the husband gives directly as he thinks proper or through a trust as the Trustees think proper. The result is the same so far as the State of Virginia is concerned, and as we see it the statutes are drawn accordingly. Why should there be any difference?

B. The manifest purpose of the Virginia Statute to prevent double taxation.

We have dealt above with the provisions of the Virginia tax law with reference to the income tax on trusts, and have shown that such income is taxable only to the Trustee and not to the beneficiary. The purpose of this, of course, is to prevent double taxation, so that both the trust and the beneficiary will not be paying the tax.

The same purpose is shown in the other provisions, as follows:

(1) Income Tax on Individuals

The income tax on individuals is provided for in Sections 36-49, inclusive, of the Tax Code. It is to be noted that Section 38, to avoid double State taxation, provides as to non-residents that they shall be taxed only on income "from all property owned and from every business, trade, profession or occupation carried on *in this state*," and where he has income from such property or activities both within and without the State, he is taxed only on income "from labor performed, business done, or property located *within the State.*"

Section 39 provides as to residents that on income derived from sources without the State, the tax payer shall be credited on his return with the income tax paid by him to such other State, provided such other State does not provide for a credit to such resident of Virginia substantially similar to that granted by Section 40.

Section 40 provides that where non-residents are liable to income tax in the State of residence, on income derived from sources in Virginia and subject to Virginia taxation, the tax here shall be credited with such proportion of the tax payable to the other State as the income from Virginia sources bears to the entire income. This section is subject to the same proviso as is Section 39 as to like provision for credit by such other State.

These two sections 39 and 40 are often referred to as the Comity sections. The New York law contains similar provisions and thus they operate as between Virginia and New York taxes where applicable.

[fol. 10] The provisions of these sections 38, 39 and 40 clearly show the intent and purpose to avoid double State taxation on the same income. Further than this, Section

25 of the Tax Code shows the same plan and purpose. Under sub-sections k and l the tax payer is allowed a deduction of "dividends on Stock of National Banks and local Banks and Trust Companies" and dividends from corporations whose income was assessable in Virginia, or a proportionate part if only part of such income is so assessable in Virginia. The purpose of these is obviously to prevent double state taxation of the same income.

(2) Income Tax on Corporations and Partnerships

This is the second classification for income tax purposes, and is covered by Sections 52-67, inclusive, of the Tax Code.

Though corporations are generally regarded as the "step-children" of taxation, the same plan of avoiding double state taxation is shown in the law as applicable to them.

Section 52 provides for income tax on Domestic Corporations and that it shall be only on income "from business done or property located, or sources *in this state*,"—clearly a provision to avoid taxation on income subject to taxation in other states.

Section 54 further carries out the same purpose in providing that where the business of a corporation is conducted partly within and partly without the State, the tax shall be on income derived "from sales wherever made of goods, wares and merchandise *manufactured or which originated in this State* or from other business done or property located *within this State.*"

As to Partnerships, the method is directly contrary to that applied to Corporations and to Estates and Trusts, in that the partnership simply makes a return showing the distributable share of income to the respective partners and the latter pay their income taxes personally. There, also, the general idea and plan to avoid double State taxation on the same income is evident in that no tax assessed against the partnership because it is assessed against the individual partners.

It is submitted that the above shows the carefully considered plan of income taxation to avoid assessment of two state income taxes on the same subjects, whether such assessment be by one or more states, and that the assessment here violates this general idea and plan, so plainly evidenced.

It is noted that under the contention of the Common-[fol. 11] wealth, with statutes similar to that of Virginia and New York, the identical income paid to a beneficiary of a discretionary trust, whenever the beneficiary be a resident of a state different from that of the trust would be subjected to a double state tax on the income, i. e. the trust pays one tax and the beneficiary pays the other. In no case would the income due or paid from a trust to a direct and ordinary beneficiary be so subjected. In this case the trust as such pays no income tax, and each beneficiary pays the tax on his own trust income, in the State of his residence. If the question of "income earned in the state of the residence of the beneficiary" is involved proper credit is provided for.

Surely there is no basis for, and as shown above no intention to discriminate there against beneficiaries of a discretionary trust and subject the income paid to them to double taxation when such is specifically and carefully guarded against as to the income from trusts paid to ordinary beneficiaries. Such a construction would create an unequal, unfair, and discriminatory burden on discretionary trust income.

It is pertinent to ask—What possible reason in equity and fairness could there be for such discrimination?

Constitutionality

That construction must be adopted, where possible, to avoid a conflict with the Constitution.

Smith v. Commonwealth, 75 Va. 904, 907.

Virginia, etc. Coal Co. v. McClelland, 98 Va. 424, 36 S. E. 479.

Where a statute is susceptible of two constructions, one within and one without the legislative powers, the Court must adopt the former.

Martin v. So. Salem Land Co., 97 Va. 349, 33 S. E. 600.

Harrison v. Thomas, 103 Va. 333, 336, 49 S. E. 495.

Louisville, etc. R. Co. v. Interstate R. Co., 108 Va. 502, 63 S. E. 369.

Tobacco Growers Asso. v. Danville Warehouse Co., 144 Va. 452, 132 S. E. 482.

This principle is carried specifically into the Tax Code (Sec. 2) as follows:

[fol. 12] "The provisions of the Tax Code of Virginia and all tax and income statutes shall always be so construed and so restricted in their application as not to conflict with any provisions of the Constitution of the United States or of the Commonwealth of Virginia, and as if the necessary limitations upon their interpretation had been expressed in each case."

As shown above, it was not the purpose of the State Legislature to subject income from a discretionary trust, or any trust, to double state taxation, that is, taxation in two states. As will be shown below, to hold otherwise would be to make the statute unconstitutional, and therefore the statute should be so construed as to avoid this result.

Contentions of Defendant and Opinion of Court

The contention of the State adopted by the lower Court was that the State of Virginia had the right to tax any income received by a resident, and that the Virginia statutes so provided. For this purpose, they cited Section 24 of the Tax Code defining gross income to include "gains or profits and income derived from estates or trusts by the beneficiary thereof." That section of the Code was, of course necessary, but was not intended to, and did not refer to the case of a beneficiary of a discretionary trust. Otherwise, to carry this contention to its logical conclusion, the Trustee under the specific provisions of the Statute would have to pay a tax on the income and then the beneficiary would have to pay an additional tax, though both the trust and beneficiary were in Virginia. It was necessary to put that provision in to provide for the case of ordinary beneficiaries whose income would have to include income from trusts, since the trustee would pay no tax on it.

The position was also taken by the Commonwealth and by the Judge, that the Virginia trust statute dealt only with resident trusts, and it thus had no reference or influence on the question of a non-resident trust. As pointed out, there is nothing in the statute which limits it to resident trusts or excludes non-resident trusts, and there is no reason why there should be. The purpose is very clear [fol. 13] that the income from a trust should be taxed only

once by a state. In the case of an ordinary Virginia trust with a non-resident beneficiary, Virginia would collect no tax because under the specific provisions of the statute, the trust pays no tax and the beneficiary would pay his tax where he resides under a similar provision that his income would include income from trusts. Similarly, in the case of an ordinary non-resident trust, the trust would pay no tax in that State and the beneficiary living in Virginia would pay his tax here. It would seem clear that the statute is carefully drawn to prevent double taxation from the same income from a trust, and there is no reason in justice or equity for discriminating against the beneficiary of a discretionary trust.

Much is made of the fact that the petitioner made her return to the United States Government, and in which she included this income. We submit that this is entirely immaterial and irrelevant. The question of double taxation does not apply as between the United States and a state, but only between two or more states. The Virginia income statutes could have no effect on the Federal income statutes. Under the Federal law an ordinary trust pays no income tax but the specific beneficiaries pay the tax on their respective income from the trust. In the case of discretionary trusts, the beneficiary pays the tax to the extent that it has been distributed to such beneficiary, while the Trustee pays the tax on income not distributed to the beneficiaries. Thus, a beneficiary of a discretionary trust is specifically required to pay tax on the income actually received during any year. The Virginia Tax Code naturally did not, and could not deal with Federal taxation, but did provide against double state taxation on the same income from trusts, as shown above.

There is now no question being raised against the contention that Mrs. Ryan received income from the trust estate. The contention is, first, that such income was not income taxable by the Virginia statutes, and, second, that any other construction would render the statute unconstitutional. The contention was made, and the opinion of the lower court stresses the fact that the State of Virginia had put no tax on the income against the trust, nor any interest in New York, but had simply taxed income of its own resident, and that the State had a right to do this, inasmuch as she receives the protection of the Virginia laws. The answer to this contention is set out above, namely, that the State of Virginia has carefully guarded against such taxation as is

[fol. 14] here made. It may be pertinent also to remark that the laws of the State of Virginia afford no protection to the petitioner so far as this income is concerned. If there were any question in regard to her rights to the income or the action of the trustees in regard thereto, she would have to go to New York, and the laws of New York would govern and control and offer the only protection that could be afforded.

The opinion of the Court, and the contention of the Commonwealth, undertook to draw a parallel between the case of corporate dividends, the income of the corporation being taxed in the state of its domicile, and the dividends being taxable to the stockholders in another state. The parallel is most inapt for the following reasons:

(1) A corporation is an entire and separate entity from a stockholder, it owns its assets and the income and can use the income as it sees fit for general expenses, expansion, advertisement, or such other purposes, and only transfer to the stockholders so much of the income or surplus as the corporation may think wise. The stockholder has no right to dictate or direct the use of the income of the corporation, except in case of gross disregard of the interests of the stockholders or illegal action by the corporation.

The case is very different with a trust. There the trustee simply holds the legal title. The property itself belongs to the beneficiaries who are the real owners. The trustee cannot use either principal or income for anything but specific trust purposes, and he must pay out the income, after deduction of necessary expenses, since it is owned by the beneficiaries, and the trustee can be required and forced to distribute. The trustee is a mere agent for the real beneficiaries, where the corporation is a separate and independent owner of its assets.

(2) As between a corporation and stockholders, the situation so far as income is concerned is very like that of two separate individuals, one of whom earns an income, a part of which he pays to a second for services or by way of interest for use of money, or otherwise, which of course is liable to the income tax. What the corporation pays out in dividends is in the nature of a contingent payment (dependent upon available earnings or surplus) for the use of the money of the stockholders, that is, the stockholder sells his money to the Corporation and the Corporation in considera-

tion thereof agrees that it will when conditions justify pay therefor in the way of dividends. The stockholders have sold and surrendered title to their money or assets, in con- [fol. 15] sideration of a pro rata part, as the Corporation may feel proper to pay out in dividends. It is quite a different situation from a trustee and beneficiary, where the principal assets are delivered to the trustee simply for handling as agent of and for the benefit of the beneficiaries.

(3) One dealing with a corporation deals with a corporation as such and in making payments to the corporation has no concern with what becomes of the money. In dealing with a trustee, however, every one is required to see to the proper application of the money paid, unless specifically excused by the trust instrument.

It is submitted that the parallel is not apt and has no bearing on the question before the Court.

Second. The Assessment Here if Justified under the Virginia Law Would be Contrary to the Provisions of the Fourteenth Amendment to the Federal Constitution

The Fourteenth Amendment is what is usually referred to as the Due Process Clause. This point depends upon Federal decisions and the situs of the income for taxation purposes.

It is submitted that the holdings of the United States Supreme Court are clear on this point, and are the result of a gradual and increasing tendency of the Court towards the view that double taxation by one or more states on the same subject matter is contrary to the protection afforded by the Fourteenth Amendment.

Two very recent U. S. Supreme Court cases, Senior v. Braden, 295 U. S. 422, 79 L. Ed. 1520, and New York ex Rel Cohn v. Graves, March 1, 1937, Adv. Ops. (No. 9), 81 L. Ed. p. 409, are to our mind conclusive on the question. In the case of Senior v. Braden, decided May 20, 1935, a resident of Ohio owned transferable certificates showing that he was a beneficiary under seven separate declarations of trust, and as such entitled to stated portions of rents from the properties, some in and some out of Ohio. During 1931, he received $2,231.29 from the rents (income) from the properties. The question was as to the right of the State of Ohio to assess and collect a tax of 5 per cent on the income there-

from under its statutes. The various parcels of land had been assessed for customary taxes in the name of the legal owner or lessee according to local law.

[fol. 16] The lower court upheld the tax in this case and argued that the certificates show an interest in the beneficiary and were a "species of intangible personal property consisting of a bundle of equitable choses in action because the provisions of the agreements and declarations of trust of record herein have indelibly and unequivocally stamped that character upon it by giving it all the qualities thereof for purposes of the management and control of the trusts," and that the tax of 5 per cent on the income was a mere basis for the tax on the property itself.

In reversing the case, the Court refers to the case of Maguire v. Trefry, in which it had upheld an income tax of another state against a beneficiary living there, on income received from a foreign trust, to the extent to which the income had not been taxed by the home state of the trust, and then proceeds as follows:

"Maguire v. Trefry, 253 U. S. 12, 64 L. ed. 739, 40 S. Ct. 417, much relied upon by appellees, does not support their position. There the Massachusetts statute undertook to tax incomes; the securities (personalty) from which the income arose were held in trust at Philadelphia; income from securities *taxable directly to the trustee was not within the statute.* The opinion accepted and followed the doctrine of Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277, and Fidelity & C. Trust Co. v. Louisville, 245 U. S. 54, 62 L. ed. 145, 38 S. Ct. 40, L. R. A. 1918C, 124. Those cases were disapproved by Farmers Loan & T. Co. v. Minnesota, 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98, 65 A. L. R. 1000. They are not in harmony with Safe Deposit & T. Co. v. Virginia, 280 U. S. 83, 74 L. ed. 180, 50 S. Ct. 59, 67 A. L. R. 386, and views now accepted here in respect to double taxation. See Baldwin v. Missouri, 281 U. S. 586, 74 L. ed. 1056, 50 S. Ct. 436, 72 A. L. R. 1303; Beidler v. South Carolina Tax Commission, 282 U. S. 1, 75 L. ed. 131, 51 S. Ct. 54; First Nat. Bank v. Maine, 284 U. S. 312, 76 L. ed. 313, 52 S. Ct. 174, 77 A. L. R. 1401."

As stated in the Maguire v. Trefry case, the tax had been assessed against a local beneficiary of a foreign trust and the holding was simply that the tax was valid to the extent

[fol. 17] that such income had not been taxed directly to the Trustees. It will be observed that the instant case is stronger, since here the whole income from the trust has already been taxed in New York against the Trustees.

The necessary result of the repudiation by the Court of the decision in Maguire v. Trefry and the statement by the Court that it is contrary to *"views now accepted here in respect to double taxation"* is that the Court specifically holds that income received by a resident beneficiary from a foreign trust is not subject to taxation by the home state of the beneficiary, even though that income had not been taxed by the state of the foreign trust. This is likewise a holding that the situs of the income from a trust is in the state of the trust and only in that state, and that such income therefore cannot be taxed by any other state.

That this is the effect of the decision is very clearly shown in the dissenting opinion filed by Mr. Justice Stone in Senior v. Braden, where, after referring to the obligation to pay taxes arising from the unilateral action of the government, and to distribute the burden among those who bear it, and the right to assess such taxes, he states as follows:

"For centuries no principle of law has won more ready or universal acceptance. Even now that it is doubted, the doubt is rested on no more substantial foundation than want of 'jurisdiction' to tax and the assertion that the Fourteenth Amendment is endowed with a newly discovered efficacy to forbid 'double taxation' when the sovereignty imposing the tax is that of two or more states. See Farmers Loan & T. Co. v. Minnesota, 280 U. S. 204, 210, 74 L. ed. 371, 374, 50 S. Ct. 98, 65 A. L. R. 1000: Safe Deposit & T. Co. v. Virginia, 280 U. S. 83, 92, 74 L. ed. 180, 183, 50 S. Ct. 59, 67 A. L. R. 386; Baldwin v. Missouri, 281 U. S. 586, 593, 74 L. ed. 1056, 1060, 50 S. Ct. 436, 72 A. L. R. 1303; compare Burnet v. Brooks, 288 U. S. 378, 400, et seq., 77 L. ed. 844, 854, 53 S. Ct. 457, 86 A. L. R. 747."

Further in the dissenting opinion Mr. Justice Stone refers to the fact that "it is now thought by the Court to be neces-
[fol. 18] sary to discredit or overrule Maguire v. Trefry, 253 U. S. 12, 64 L. ed. 739, 40 S. Ct. 417, supra, in order to overturn the tax imposed here * * *."

The fact that there was a dissenting opinion shows that the matter was thoroughly argued out by the Court among

themselves and that the holding in Maguire v. Trefry was in fact overruled, and deliberately overruled, and the Court has thus specifically and definitely held that the Fourteenth Amendment to the Constitution of the United States protects the citizens against double taxation by one or more states on the same subject of taxation.

In New York ex rel. Cohn vs. Graves (March 1, 1937), supra, the actual question involved the right of a state to tax a resident on income from bonds which were physically located in another state, secured by mortgage in such other state, and on income (rents) from real estate located in such other state.

The Court upheld the tax on the basis that the property and the income therefrom were separate and independent subjects of taxation and there was no double taxation where neither state undertakes to tax both. The opinion by Stone, J., says:

"The imposition of these different taxes by the same or different states upon the distinct and separable taxable interests, is not subject to the objection of double taxation *which has been successfully argued in those cases where two or more states have laid the same tax* upon the same property interest in intangibles or upon its transfer at death." Cases cited.

And again:

"But, as we have seen, it does not follow that a tax on land and a tax on income derived from it are identical in their incidence or rest upon the *same basis of taxing power, which are controlling factors in determining whether either tax infringes due process.*"

We submit that the above shows that the U. S. Supreme Court has expressly and plainly taken and stated the view that the same subject matter cannot be taxed by two or more [fol. 19] states under the due process clause. Clearly New York had the right to tax the income on the New York trust the assets of which were all kept, held and administered in New York, and the income being taxed there, it could not be taxed in Virginia without violating the "views now accepted here in respect to double taxation."

It is admitted that tax had now been assessed by both New York and Virginia on the identical "Income" received

by Mrs. Ryan. There has been admitted and obvious "double taxation" on the same subject matter by two states.

As stated above, this holding of the Court is not a sudden action, but is a view which has been entertained by the Court for some years back, as evidenced by its decisions beginning with the case of Safe Deposit & Trust Company v. Virginia, 280 U. S. 83, 74 L. ed. 180, 67 A. L. R. 387. In this case the question was as to the right of the State of Virginia to tax to resident beneficiaries assets in a foreign trust (created by a resident of Virginia). Under the trust the principal and income accumulating was held by the Trustees until the beneficiaries should respectively reach twenty-five years of age and then to be paid over. The Court refers to the fact that "* * * Nobody within Virginia has a present right to their (the assets) control or to receive income therefrom, or to cause them to be brought physically within her borders."

The principle modilia sequunter personam was claimed by State to authorize the taxation in Virginia as giving a legal situs in Virginia for taxation.

The Supreme Court in refusing to apply the principle, said that it was ordinarily a general rule to be applied, but added:

"But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere and ought not to be applied if to do so would result in inescapable and *patent injustice whether through double taxation or otherwise*," and

"A statute of a State which undertakes to tax things wholly beyond their jurisdiction or control conflicts with the 14th Amendment."

The Court then decides that:

[fol. 20] "Here we must decide whether intangibles—stocks and bonds—in the hands of the holder of the legal title with definite taxable situs at its residence, not subject to change by the equitable owner may be taxed at the latter's domicile in another State. We think not. The reason which led this Court in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 50 L. ed. 150, 26 Sup. Ct. Rep. 36, 4 Conn. Cas. 493, and Frick v. Pennsylvania, supra, to deny the application of the maxim mobilia sequunter personam to tangi-

bles applies to intangibles in appellant's possession. They have acquired a situs separate from the beneficial owners. The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation; both unjust and oppressive. The principle mobilia sequunter personam 'was intended for convenience, and not to be controlling where justice does not demand it.' "

Attached to the report of the Safe Deposit & Trust Co. case in 67 A. L. R. is an extended note in which the author refers to the fact that the effect of the decision is to override not only the particular case considered by the holding in a number of other Virginia cases, viz.: Seldon v. Brooke, 104 Va. 832, Brooklyn Trust Co. v. Booker, 122 Va. 680, and Wise v. Comm., 122 Va. 693.

The Safe Deposit case deals with the corpus of the trust fund and not with income but it is cited and discussed to show the principles involved—viz. that the Court will disregard ordinarily accepted principles and apply the protection of the Due Process Clause to prevent double taxation and injustice.

For this reason, in the Frick case, supra, it refused to apply the mobilia sequunter personam rule to tangibles and in the Safe Deposit case, it refused to apply it to intangibles.

Why should there be any difference to the application of the Fourteenth Amendment to prevent double taxation on tangibles and intangibles than in its application to prevent double taxation on income? Is the citizen any more hurt by double taxation on one than on the other?

The whole amount on which the tax in question is placed is the same collected by the New York Trustees, accounted [fol. 21] for there, and tax paid on it there. The situs of such "Income for tax purpose was in New York. It is admitted that the New York Trustees have paid the full state income tax on all of the income in New York. It would seem clear from the decisions of the U. S. Supreme Court that the Fourteenth Amendment protects a citizen against double taxation by one or more states on the same subject. There can be no question but that the tax assessed here is in fact a second taxation on the same fund (trust income), which has already been taxed by the State of New York. Such a tax would, therefore, be contrary to the principles accepted by the United States Supreme Court in the

cases above cited, as well as in the cases cited below. The State of Virginia could levy a tax against the Trustees on income derived from Virginia sources. However, it is not shown, and in fact there is no income derived from Virginia sources involved in this case, with the exception possibly of income received by the Trustees from Virginia corporations, and which under the Virginia law is deductable, and proper deduction has been made, as shown in the agreed statement of facts. Sections 4 and 5 deal with deductions provided for in Section 25 of the Virginia Tax Code. The tax here is clearly a tax against a beneficiary with respect to alleged income, upon which the Trustees have already been fully taxed in New York.

The decisions cited above show the views of the U. S. Supreme Court, with reference to double taxation, and this tendency is progressively shown by other decisions, as follows:

In Farmers Loan & Trust v. Minn. 280 U. S. 204, 50 Sup. Ct. 98, 74 L. ed. 371, the Court again cuts away double taxation in holding that the Fourteenth Amendment prohibited the assessment of an inheritance tax by the State of Minnesota on bonds of residents and *and* corporations of Minnesota, and to accomplish this and protect against double state taxation expressly overrules the case of Blackstone v. Miller, 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277, under which for years such double assessment had been permitted.

In First National Bank of Boston v. Maine, 284 U. S. 312, 52 Sup. Ct. 174, 76 L. ed. 313, the same rule was applied to prevent double state inheritance taxation (by two states) on stock in domestic corporations, owned by a non-resident decedent. The Court refers to the Farmers Loan & Trust Company case of which it said:

[fol. 22] "The view that two states have power to tax the same, transfer on different and inconsistent principles was distinctly rejected. * * *."

The Court then quotes the conclusion of the Farmers Loan & Trust Co., case, as follows:

"Taxation is an intensely practical matter and laws in respect of it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive con-

sequences. We have determined that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy immunity against taxation at more than one place similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The last quotation might well apply to the case at bar. The subjects are different but the same principles operate with equal force on income, as on tangibles and intangibles.

For other cases applying the same principles to other subjects see Baldwin v. Missouri, 281 U. S. 586, 74 L. ed. 1056, 50 S. Ct. 436, 74 A. L. R. 1303, and Bender v. S. C. Tax Com.; 282 U. S. 1, 75 L. ed. 131, 51 S. Ct. 54.

The same principle of the protecting power of the Fourteenth Amendment to prevent double state taxation on the same subject is illustrated in Burnet v. Brooks, 228 U. S. 378, 77 L. ed. 845. The opinion by Chief Justice Hughes at page 855, states:

"It was this '*rule of immunity* from taxation by more than one state', deducible from the decisions in respect of various kinds of property that the Court applied in First National Bank v. Maine, supra."

It is respectfully submitted that to sustain the contention [fol. 23] of the State in the instant case that the tax was properly assessed against petitioner here, would not only do violence to the Virginia statutes, disregarding the classifications and the provisions of the statutes with reference to tax on trusts, but would render the statute unconstitutional to this extent, and would do violence to the principles above set out, that a statute must be construed, if possible, to render it constitutional; and to give such construction would in fact render the statute unconstitutional under the clear holdings of the United States Supreme Court, as set out in the above decisions.

Petitioner therefore prays that a writ of error and supersedeas be awarded to the said judgment of the Circuit Court of Nelson County, and that said judgment be reversed, and that an order be entered in this Court directing that the

amount paid by petitioner on income taxes, viz: $8,996.46, for the years 1931, 1932, and 1933, be refunded to petitioner, or her attorneys of record.

The attorneys for petitioner desire to state orally the reasons why the writ of error and supersedeas should be granted, and in the event that the same is granted, this petition will be used as the opening brief.

A copy of this petition was, pursuant to Rule II of this Court, as amended, mailed to Henry R. Miller, Jr., attorney for the Commonwealth, on the 30th day of April, 1937.

Respectfully submitted, Caskie & Frost, Attorneys for Mary T. Ryan, by Jas. R. Caskie.

The undersigned attorneys practicing in the Supreme Court of Appeals of Virginia, certify that in our opinion the judgment complained of in the foregoing petition should be reviewed by the Supreme Court of Appeals of the State of Virginia.

Respectfully, Jas. R. Caskie, E. M. Frost.

ORDER GRANTING WRIT

Writ of error and supersedeas granted. Bond $300.00.

H. B. Gregory.

5 12-37.

[fol. 24] IN CIRCUIT COURT OF NELSON COUNTY

PETITION

To the Honorable Edward Meeks, Judge of the Circuit Court for the County of Nelson, Virginia:

Your petitioner, Mary T. Ryan, a resident of the State of Virginia, would respectfully show that she is aggrieved by taxes on alleged income assessed against your petitioner by the Department of Taxation of the State of Virginia, on October 24, 1934, in the sum of $8,996.46, as follows:

Tax Year	Page and Line	Subject of Taxation	Values	Taxes Assessed	Total Amount Due
1931	43–1	Income	68,348	2,050.44	
1932	43–1	Income	92,901	2,787.03	
1933	43–1	Income	138,633	4,158.99	8,996.46

Your petitioner would further show that the said erroneous assessment was not caused by the wilful failure or refusal of petitioner to furnish a list of her property and income to the tax assessing authorities, as the law requires.

Your petitioner would further show that the amounts for the respective years, as set out above, and on which the taxes were assessed, were sums paid to your petitioner by the Trustees under the will of Thomas F. Ryan, a resident of the State of New York, who died on November 23, 1928. Under the will of the said Thomas F. Ryan, the estate was divided into fifty-four equal parts, and Clendennin J. Ryan, a resident of New York, and Guaranty Trust Company, a corporation of the State of New York, were appointed as trustees for the estate, and have been conducting the trust since that time. The said will was probated in the State of New York and the Trustees qualified in said state. The said Trustees took over the estate and have been handling and controlling the same under the laws of the State of New York, where all the assets in the hands of the Trustees are kept, and the management, accountability, and control of the said trust is vested in and exercised by the Courts of the State of New York, and the accounts of the Trustees are settled there. The said Trustees pay to the State of New York the income tax on the total income from the assets in their hands and distribute the remainder to the parties entitled. The provision of the will of the said Thomas F. Ryan under which the sums were so paid to your petitioner by the Trustees, is as follows:

"Twelve (12) of said equal parts to said Trustees in trust to receive the income therefrom, and to pay over [fol. 25] such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life in such installments and at such intervals as they in their sole discretion may determine," (Article Fourth, sub-division F, of the said will.)

The said will further provides that the said Trustees should "divide any surplus income from said twelve parts not paid to my wife as aforesaid, into forty-two equal portions, and to pay such surplus income in equal quarterly payments as near as may be" to certain distributees as designated in said will, and that upon the death of the

said wife the principal amount of the said twelve equal parts should be divided and distributed to certain designated distributees, as set out in said will.

The said will was subsequently, on, to-wit, August 24, 1929, probated in the Circuit Court for Nelson County, Virginia, in which County the said Thomas F. Ryan owned certain real estate. No part of the income received by the Trustees is from any property located or kept within the State of Virginia.

Your petitioner is further advised and insists that the sums so taxed as above were not properly classed as income to petitioner, nor subject to taxation as such under the laws of the State of Virginia; that there was no authority under the laws of Virginia for such assessment in Virginia; that the so called income is exempt and excluded from taxation under such laws; that the said assessments were not made within the time provided by law; that the said assessments constitute a double assessment of tax; that the law under which said assessments are made is unconstitutional in that it operates to deprive the petitioner of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States; and that the said assessments and tax are otherwise illegal and erroneous.

Your petitioner would further show that the amount of said tax, to-wit, $8,996.46, has been paid to the Treasurer of Virginia, but under protest.

Petitioner attaches hereto the pertinent section of the New York tax law, that being Section 365 of said law, under which the income of the whole trust estate is taxed in that State.

Petitioner therefore prays that the said tax so erroneously assessed may be declared invalid and void, and that the petitioner may be exonerated from payment of same, and that order may be entered directing repayment [fol. 26] to your petitioner of the amount so paid, pursuant to the provisions of Section 410 of the Tax Code of Virginia. And your petitioner will ever pray, etc.

Mary T. Ryan, by Counsel; Caskie & Frost, Attorneys for Petitioner.

Exhibit to Petition

Section 365, New York Tax Law

"Estates and trusts.—1. The tax imposed by this article shall apply to estates and trusts, which tax shall be levied, collected and paid annually upon and with respect to the income of estates or of any kind of property held in trust, including:

a. Income received by estates of deceased persons during the period of administration or settlement of the estate;

b. Income accumulated in trust for the benefit of unborn or unascertained persons or persons with contingent interests;

c. Income held for future distribution under the terms of the will or trust;

d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, and the income collected by a guardian of an infant to be held or distributed as the court may direct; and

e. Income of an estate during the period of administration or settlement permitted by subdivision three to be deducted from the net income upon which the tax is to be paid by the fiduciary."

"3. In cases under paragraphs a, b, and c of subdivision one, of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, except that in determining the net income of the estate of any deceased person during the period of administration or settlement there may be deducted the amount of any income properly paid or credited to any legatee, heir or other beneficiary. In such cases, the estate or trust shall be allowed the same exemptions as are allowed to single persons under section three hundred and sixty-two, and in such cases an estate or trust created by a person not a resident and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than resi- [fol. 27] dents are liable under section three hundred and fifty-nine, subdivision three.

4. In cases under paragraphs d and e of subdivision one of this section, if the distribution of income is in the dis-

cretion of the fiduciary, either as to the beneficiaries to whom payable or as to the amounts to which any beneficiary is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credit to any such beneficiary. In all other cases under paragraphs d and e of subdivision one of this section, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share whether distributed or not, of the net income of the estate or trust for the taxable year, or, if his net income for such taxable year is computed upon the basis of a period different from that upon the basis of which the net income of the estate or trust is computed, then his distributive share of the net income of the estate or trust for any accounting period of such estate or trust ending within the fiscal or calendar year upon the basis of which such beneficiary's net income is computed. In such cases the income of a beneficiary not a resident, derived through such estate or trust, shall be taxable only to the extent provided in section three hundred and fifty-nine, subdivision three, for individuals other than residents."

IN CIRCUIT COURT OF NELSON COUNTY

MARY T. RYAN, Petitioner,

vs.

THE COMMONWEALTH OF VIRGINIA, Respondent

ANSWER OF COMMONWEALTH OF VIRGINIA.

This respondent, the Commonwealth of Virginia, by the [fol. 28] Attorney General of Virginia, for answer to the petition of Mary T. Ryan against the said Commonwealth of Virginia, answering says:

1. That the petitioner, Mary T. Ryan, is now and has been for a number of years, particularly throughout the calendar years 1930, 1931, and 1932 and on December 31st of each of said years, a legal resident of and domiciled in Virginia, and has maintained her usual place of abode in Virginia throughout all of said years;

2. That she has regularly and voluntarily filed with the Commissioner of the Revenue for the County of Nelson, Vir-

ginia, her individual State income tax returns of income received by her during the calendar years 1930, 1931 and 1932, showing therein a net taxable income running into the 3% bracket for computing the tax thereon for each year, but did not include in her taxable income so reported in such returns the amounts received by her from the so called "Mary T. Ryan Trust," which was the Trust set up under the will of Thomas F. Ryan, as alleged in the petition herein;

3. That in the regular course of the audit of the returns by the Department of Taxation, it was ascertained that this petitioner received in the calendar years 1930, 1931 and 1932, from the said "Mary T. Ryan Trust" additional sums which under the statutes of Virginia were from taxable sources and which constituted net taxable income to her in addition to the net taxable income reported in the returns filed by her, which sums of additional net taxable income were in the amounts set out below, and the Department of Taxation on October 24, 1934, thereupon assessed her with additional State income taxes in the amounts and for the tax years, as follows, namely:

Years in Which Income Received	Tax Year	Additional Net Taxable Income	Amount of Taxes
1930	1931	$ 68,348.00	$2,050.44
1931	1932	92,901.00	2,787.03
1932	1933	138,633.00	4,158.99
Total Tax			$8,996.46

all of which said tax amounting to $8,996.46 was fully paid to the Treasurer of Virginia on the 12th of December, 1934, but this respondent admits that said payment was made under protest;

4. That this respondent admits that said assessment was not caused by the wilful failure or refusal of this petitioner [fol. 29] to furnish a list of her property or income to the tax assessing authorities, as the law requires;

5. That your respondent is advised and believes and therefore alleges that the said petitioner filed with the United States Government her federal income tax returns

and included therein as a part of her net taxable income the full amounts of income constituting the bases of these assessments of State income taxes and that the federal income taxes have been paid thereon without protest and without any application having as yet been made for a correction of said federal income taxes;

6. That this respondent is advised and therefore alleges that the entire amount of tax has been lawfully and correctly assessed and has been correctly paid and that the petitioner is not entitles to a refund of any portion thereof;

7. That your respondent admits all statements of fact that are made in the petition herein, but denies all expressions of opinion and conclusions of law, especially those found in the last paragraph beginning on page two (2) of the petition and further alleges that the section of the New York tax law, as set out in the copy of said law attached to said petition, is irrelevant to the issues herein.

And having fully answered, this respondent prays to be hence dismissed.

Abram P. Staples, Attorney General; W. W. Martin, Assistant Attorney General; Henry R. Miller, Jr., Attorneys for Respondent.

IN CIRCUIT COURT OF NELSON COUNTY

[Title omitted]

ORDER DOCKETING CASE—July 22, 1935

[fol. 30] This day came Mary T. Ryan, by counsel, and presented her notice and petition for correction of alleged erroneous assessment of income tax by the State Department of Taxation. And it appearing to the Court that a copy of said notice and petition were served on C. H. Morrissett, more than ten days prior hereto and that the said notice and petition were filed in the Clerk's Office of this Court on the 10th day of July, 1935, it is ordered that this matter be placed on the docket of the Court and set for hearing.

IN CIRCUIT COURT OF NELSON COUNTY.

[Title omitted]

STIPULATION OF FACTS

"It is hereby stipulated and agreed between the parties by their respective attorneys that the following are all of the facts and exhibits herein, which facts and exhibits are to be taken and considered by the Court as if the facts had been properly testified to in open court and said exhibits had been properly introduced and proven in open court:

1. That the petitioner, Mary T. Ryan, is now and has been for a number of years, particularly throughout the calendar years 1930, 1931 and 1932 and on December 31st of each of said years, a legal resident of and domiciled in Virginia, and has maintained her usual place of abode in Virginia throughout all of said years;

2. That she has regularly and voluntarily filed with the Commissioner of the Revenue for the County of Nelson, Virginia, her individual State income tax returns of income received by her during the calendar years 1930, 1931 and 1932, showing therein a net taxable income running into the 3% bracket for computing the tax thereon for each year, but did not include in her taxable income so reported in such returns the amounts received by her from the so called "Mary T. Ryan Trust," which was the Trust set up under the will of Thomas F. Ryan.

3. That in the regular course of the audit of the returns [fol. 31] by the Department of Taxation, it was ascertained that this petitioner received in the calendar years 1930, 1931 and 1932, from the said "Mary T. Ryan Trust" additional sums which were in the amounts set out below, and the Department of Taxation on October 24, 1934, thereupon assessed her with additional State income taxes in the amounts and for the tax years as follows, namely:

Years in Which Income Received	Tax Year	Additional Net Taxable Income	Amount of Taxes
1930	1931	$ 68,348.00	$2,050.55
1931	1932	92,901.00	2,787.03
1932	1933	138,633.00	4,158.99
		$299,882.00	
Total Tax			$8,996.57

all of which said tax amounting to $8,996.46 was fully paid under protest to the Treasurer of Virginia on the 12th day of December, 1934.

4. That the amounts so paid to the said Mary T. Ryan, upon which said $8,996.46 of taxes were assessed, represent the net amount of interest from taxable bonds and notes and the net amount of dividends from corporations whose dividends are normally subject to the Virginia income tax when received directly by a resident of Virginia, after deduction of the commissions paid to the Trustees of said Mary T. Ryan Trust, and deduction of such proportion of the dividends as may be deductible by virtue of subsection (1) of Section 25 of the Tax Code of Virginia, which is as follows:

Section 25. Deductions allowed.—Taxpayers reporting income as prescribed by this chapter shall be allowed the following deductions:

"(1) Dividends received during the taxable year from stock in any corporation, the income of which was assessable for the preceding year under the provisions of the income tax laws of this state; provided that when only a part of the income of any such corporation was so assessable, only a corresponding part of the dividends received therefrom shall be deductible."

5. That said assessment was not caused by the wilful failure or refusal of this petitioner to furnish a list of her property or income to the tax assessing authorities, as the law requires;

[fol. 32] 6. That the said Mary T. Ryan filed with the United States Government her Federal income tax returns and included therein as a part of her net taxable income the full amounts of the payments made to her and constituting the bases of these assessments of State income taxes, and the Federal income taxes have been paid thereon without protest and without any application having been made by the said Mary T. Ryan for a correction of such Federal income taxes.

7. That the Trustees under the will of Thomas F. Ryan regularly made their Federal income tax returns and deducted in such Federal fiduciary returns the entire amounts of payments made to the said Mary T. Ryan, leaving it to

the said Mary T. Ryan to report such payments to her to the Federal Government in her individual Federal income tax returns.

8. That the amounts so paid to the said Mary T. Ryan and upon which the State income taxes were assessed herein were sums paid to her by the Trustees under the Will of Thomas F. Ryan, a resident of the State of New York who died on November 23, 1928, a copy of which Will is hereto attached and marked Exhibit A, and is to be taken and considered as an exhibit properly testified to and proven in this cause. Under the Will of the said Thomas F. Ryan the estate was divided into fifty-four equal parts and Clendennin J. Ryan, a resident of New York, and Guaranty Trust Company, a corporation of the State of New York, were appointed as Trustees for the estate, and have been conducting the Trust since that time. The said Will was probated in the State of New York and the Trustees qualified in said State. The said Trustees took over the estate and have been handling and controlling the same under the laws of the State of New York, where all the assets in the hands of the Trustees are kept, and the management, accountability, and control of the said Trust is vested in and exercised by the courts of the State of New York, and the accounts of the Trustees are settled there. The said Trustees pay and have paid for each of the tax years in question to the State of New York the income tax on the total income from the assets in their hands and distribute the remainder to the parties entitled. The provision of the Will of the said Thomas F. Ryan under which the sums were so paid to your petitioner by the Trustees, is as follows:

"Twelve (12) of said equal parts to said Trustees in trust to receive the income therefrom, and to pay over such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life, in such installments and at such intervals as they in their [fol. 33] sole discretion may determine." Article Fourth, sub-division F. of said Will.)

The said Will further provides that the said Trustees should "divide any surplus income from said twelve parts not paid to my wife as aforesaid, into forty-two equal portions, and to pay such surplus income in equal quarterly payments as near as may be" to certain distributees as

designated in said Will, and that upon the death of the said wife the principal amount of the said twelve equal parts should be divided and distributed to certain designated distributees, as set out in said will.

The said Will was subsequently, on, to-wit, August 24, 1929, probated in the Circuit Court for Nelson County, Virginia, in which County the said Thomas F. Ryan owned certain real estate. No part of the income received by the Trustees is from any property located or kept within the State of Virginia.

9. That the attached Exhibit B is a true copy of Section 365 of the New York Income Tax Law, under which law the income of the whole trust estate is taxed in New York State, and which exhibit is to be taken and considered by this court as sufficient proof of the existence of Section 365 of the New York Income Tax Law.

10. That Exhibits C, D and E attached hereto are true copies of the income tax returns and schedules attached thereto filed by the said Mary T. Ryan with the Commissioner of the Revenue for the County of Nelson, showing a report of her income received by her in the calendar years 1930, 1931 and 1932, respectively, and are to be taken and considered by the court as if the originals thereof had been properly testified to and introduced in open court.

This Stipulation is not to be taken as admitting any conclusions of law set out in either the application and petition of Mary T. Ryan, or in the answer of the Commonwealth of Virginia, and is made without prejudice to the right of either party to make proper exceptions on the ground of relevancy or materiality of any of the stipulated facts, and each party shall have a right to make such objections on such grounds as they may be advised, as to relevancy or materiality of any such facts.

Caskie & Frost, Attorneys for Petitioner. Abram P. Staples, Attorney General; W. W. Martin, Assistant Attorney General; Henry R. Miller, Jr., Attorneys for Respondent.

[fol. 34] Exhibit "B" to stipulation omitted. Printed side page 26, ante.

[fol. 35] IN CIRCUIT COURT OF NELSON COUNTY

MARY T. RYAN, Plaintiff,

v.

COMMONWEALTH OF VIRGINIA, Defendant

JUDGMENT—November 9, 1936

On the ninth day of April, 1936, came the petitioner, by her attorney, and also the defendant by its attorney, and by agreement of counsel this application came on to be [fol. 36] heard upon the petition filed herein, the stipulation of facts entered into by the parties which stipulation is made a part of the record herein, the oral arguments of counsel and briefs filed herein, whereupon consideration of all of which the court is of opinion, as expressed in its written opinion filed herein, that the petitioner is not entitled to the relief prayed for in her petition, and it is ordered by the court that the application of the petition for relief against the income tax assessments involved in these proceedings be, and the same is hereby denied and the petition dismissed, and that the defendant recover of the petitioner its costs in this behalf expended.

To which order of the court petitioner, by counsel, excepted and prayed that her exception be noted of record, which is accordingly done.

The petitioner, by counsel, indicating an intent to apply to the Supreme Court of Appeals of Virginia for a writ of error, it is ordered that the execution of this order be suspended for ninety days from date.

Clerk's certificate to foregoing transcript omitted in printing.

IN CIRCUIT COURT OF NELSON COUNTY

MARY T. RYAN, Petitioner,

vs.

COMMONWEALTH OF VIRGINIA, Petitionee

Decision

OPINION

[fol. 37] On Nov. 23rd, 1928, Thos. F. Ryan, a resident of the State of New York, died leaving a will, under the terms of which the petitioner, Mrs. Mary T. Ryan, his widow, received, from the designated representatives of his Estate, the sum of $68,348.00 in 1931, on which Virginia asserted a tax of $2,050.55, the sum of $92,901.00 in 1932, on which Virginia asserted a tax of $2,787.03, and the sum of $138,633.00 in 1933, on which Virginia asserted a tax of $4,158.99, making a total tax of $8,996.57, which has been paid under protest, on total payments of $299,882.00. The Petitioner is seeking recovery of the tax paid by her on account of the monies paid to her from the Estate-Trust of her deceased husband.

Issue on the Proposition: Can the State of Virginia levy, assess, and collect income tax on beneficial payments from an Estate in another State, after received in former State, although income tax was assessed and paid on the entire income of said Estate, including payments to petitioner, in the latter State?

The petitioner contends the tax of Virginia by way of income is illegal and void because:

First. The assessment was not made in time prescribed;

Second. The amounts received by her were in lieu of Dower, she was a purchaser thereof for value, or stood in the position of an annuitant;

Third. The amounts received were not income as such taxable under the law of Virginia; and,

Fourth. The Virginia law under which the tax is imposed is null, void, and unconstitutional, as constituting "double taxation."

The grounds "first" and "second" have been abandoned and authorized to be disregarded and hence will not be considered, leaving only "third" and "fourth," which will be dealt with in order named. Petitioners' Brief—page 14 —and Letter dated April 24th, 1936.

Third. The amounts received were not income as such taxable under the law of Virginia.

The law of Virginia concerning taxes on income is found in Chap. 6 of the Tax Code; embracing Sec. 23 to Sec. 67–, Incl. Much has been stated by the contending parties here as to the applicability of Secs. 50 and 51—pertaining to the income on Estates and Trusts. It would certainly seem that, considering the language of these Sections, the general purpose of a lawful tax and the inclination and presumption in favor of a valid and constitutional construction, rather than an invalid and unconstitutional one, together with the clear intention of the law making body, these Sections do not bear primarily upon or concern and determine [fol. 38] the tax involved here. The Estates and Trusts alluded to are those within the confines or jurisdictional boundaries of Virginia and the incomes derived here or such portions as are taxable commensurate with the Estates and Incomes here; the fiduciaries are directed in so far as they are within reach of the Statutes of this State; the estates and trusts in Virginia are touched even though created by a non-resident, or exist herein when owned by a non-resident. The situs of the property affected is the pole star, and the fact that this distinction is made sure in the law, but demonstrates that the Legislature was not attempting to go beyond its boundaries to lay a tax; in view of all law and reason, the law body of Virginia would not pretend to tax an Estate or a Trust in New York State, or to exercise control over its Fiduciaries, Trustees, Executors, etc. A reading of these Sections impresses this conclusion, and the fact that, as asserted in the beginning of Sec. 50, merely imposed an income tax as therein specified on estates and trusts within Virginia akin to the income tax imposed on individuals.

Virginia has not imposed any income tax on the Estate of Thos. F. Ryan in New York, nor on any Trust there by him created, nor on or against any Estate or Trust in the hands of his Trustees or Executors as has been done in New York under Sec. 365 of its Tax Code similar to our

Sec. 50; it has asserted that, under its laws, the monies paid to the petitioner, Mrs. Mary T. Ryan, beneficiary, in Virginia, by the representatives of said Estate or Trust therein created, are income in the hands of said beneficiary and subject to income tax in accordance with its Statutes. Virginia has an income tax law of broad extent and above referred to; in Sec. 24 of the Tax Code, so far as here necessary, defines gross income as follows: "The term 'gross income,' as used herein, included gains, profits * * *; * * * or gains or profits and *income derived from any source whatever;* including gains or profits and *income derived through estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares;* but * * * does not include the following items, which shall be exempt from taxation under this chapter: (c)—The value of property acquired by gift, bequest, devise or inheritance received during the year, *but the income received from such gifts, bequests, devises and inheritance shall be assessed under the provisions of this chapter.*" The succeeding Sections of the Tax Code prescribe the method for arriving at the "net income" to be taxed after certain deductions, which are concededly correct, or no question is raised in that respect for a failure to give proper credits and make proper deductions. Are these monies paid to and received [fol. 39] by the Petitioner in Virginia income and taxable as such? Under the will of the said Thos. F. Ryan, Article Fourth—F—creating the interest and generating the power by which the funds were brought into being—they are called income and directed to be paid as such; we read: "F. Twelve (12) of said equal parts to my said trustees in trust to receive the income therefrom and to pay over such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support, and comfort during her life in such instalments and at such intervals as they also in their sole discretion may determine." Here is the source of the money and it is there directed and stated that the estate shall be set aside and the income therefrom paid as directed by those authorized. The Statute of Virginia referred to above (Sec. 24 of the Tax Code) states clearly that such sums derived from estates and trusts etc. by beneficiaries are income—taxable gross or net income; she had the power to so classify. A State has a right and power

to specify and classify property within its limits for taxation, so long as the classification is proper, reasonable, necessary, and not arbitrarily wrong, and that such classification is duly observed throughout the territory, producing equal and uniform taxation, and does not result in oppression and confiscation. See Carpel vs. Richmond—162 Va., p. 833—bearing on this and other vital points in this proceeding. Virginia has the right to make this classification of income for income taxation—nothing has been shown against it. The petitioner herself has classified the monies as income—she has received them under said will, from and on account of which she could only receive them, as income, and has returned them as income to the Federal Government as a basis for Federal income tax, paid that tax without protest, and is not seeking or asking its return.

Therefore, aside from mere terminology, it would seem that the funds received by the Petitioner, Mrs. Mary T. Ryan, for the years 1931, 1932, and 1933, assessed as a basis for the income tax here involved, are income, and that the law of Virginia is correct and within its scope and power to so designate and regard it as set apart for income taxation and subject to that tax when paid into the hands of the petitioner-beneficiary, a citizen and resident of its jurisdiction and domain.

Fourth. The Virginia law under which the tax is imposed is null, void, and unconstitutional, as constituting "double taxation."

The petitioner here claims that since the entire income from the Estate or Trust of the late Thos. F. Ryan has been [fol. 40] taxed and paid in the State of New York to the Trustees or the Estate, the law of Virginia, in so far as it taxes the funds paid to and received by her individually in Virginia as beneficiary under said will as aforesaid as income, transcends the Fourteenth Amendment to the Constitution of the United States ("Due Process Clause"), depriving her of her property without due process of law, constituting double taxation, and is null and void.

As hereinbefore stated, Virginia has not taxed any estate or trust in New York, nor any person or persons there holding the estate or trust, nor any interest in New York. It has stated that certain returns from estates or trusts shall be set apart and taxed as income. Mrs. Ryan, the petitioner,

for the years 1931, 1932, and 1933, was a resident citizen of Virginia, and received as such, income from the estate of her late husband, and paid into Virginia to her, sums aggregating $299,882.00, on which the income tax amounted to $8,996.57; she enjoys and receives the benefit from Virginia and her laws—their protection, comfort convenience, and all else they have to offer her as a citizen, and to her, as to all others so situated and receiving income or property, Virginia has the right, privilege, and power to tax in due accord, keeping and commensurate with the wealth and riches she possesses for the upkeep and maintenance of its government.

"The guaranty of the equal protection of the laws does not deprive the States of the power to adjust their systems of taxation in accordance with their own ideas of public policy"—Corpus Juris 12—p. 1151—Sec. 881.

"Each state, however, with regard to the taxation of property within its limits is sovereign and independent"—Corpus Juris 61—p. 141—Sec. 73.

"Double taxation means taxing twice, for the same purpose, in the same year, some of the property in the territory in which the tax is laid, without taking all of it"—R. C. L. 26—p. 263.

There is not any "double taxation" here as within the meaning of the law and that phrase. This money taxed came right into the hand of Mrs. Ryan in Virginia and taxed only once to her as income, for one purpose under the law, for one tax period, and all similar property under the Statute was likewise taxed. See Peninsular Transit Corp. vs. Com'th.—165 Vs., p. 614—and especially at page 626—dealing with "double taxation" as defined in R. C. L. p. 263—Supra; also Hunton vs. Com'th.—183 S. E. p. 873 (S. E. Pamphlet No. 9—April 2nd, 1936)—holding that a tax on the dividends of railroad and electric power companies as [fol. 41] income is valid, although the corporations pay franchise and other state taxes. There is no more double taxation then is placed on the same property under various guise in Virginia, or as on dividends taxed as income to Virginia citizens on certain foreign corporations otherwise taxed in their jurisdictions, altogether recognized as legal and valid.

There are numerous authorities from the United States Supreme Court cited—notably:

Maguire vs. Trefy—253—U. S. p. 12;
Senior vs. Braden—295—U. S. p. 422;
Safe Deposit etc. vs. Com'th. of Va., 280—U. S., p. 83;
Frick vs. Penn.—268—U. S., p. 473;

Farmers Loan etc. vs. Minn.—280—U. S., p. 204; and others of the same tenor—the leading cases stressed are Maguire vs. Trefy and Senior vs. Braden—Supra. The former case held that income paid into Massachusetts from Pennsylvania under a Statute of the former State was taxable there, while the latter case, dealing with actual property interests held that the State of Ohio had no right or power to tax such interests beyond its jurisdiction along with similar interests within its limits, all the other authorities, including those cited and many others, follow the plan and well settled rule of law under the particular facts of each case, that no State can impose a tax on property beyond its territorial limits and beyond its power but within its boundary as to property having its situs there and being there as a matter of fact, the State is Supreme and can exercise its sovereign power to classify and to tax. As in the Maguire-Trefy Case, Virginia has a Statute and has a right to so tax thereunder and derive the benefit of the taxation for the support of its government, covering property as it comes within its jurisdictional and taxing powers.

In summary: The income tax law of Virginia is embraced in Chap. 6—of the Tax Code—containing the Sections 23-to-67—Incl., above mentioned; Sec. 24 defines "gross income," while Sections 25 and 26 provide for legal deductions, arriving at "net income" as given in Sec. 27—computed under Sec. 30; incomes are taxable only to the State (Sec. 35) and, after certain exemptions allowed, Sec. 38 states: "A tax is hereby annually levied for each taxable year upon *every resident individual* of this State, upon and with respect to his *entire net income* as herein defined for purposes of taxation" * * *, and then, after giving the rate and providing for certain taxes against non-residents, it concludes "* * * The taxes levied by this chapter shall be assessed, collected and paid as provided by law." It is [fol. 42] respectfully submitted that when Virginia so defined and classified what should be regarded as income

(embracing the monies taxed here as such), when they came into the hands and possession of its residents, living here, in Virginia, under its government, it was acting within the scope and power of its independent sovereign authority, under its law making body, and was not depriving its citizens or any citizen of the United States of his property without due process of law, or doing any act constituting "double taxation" contrary to the Fourteenth Amendment to the Federal Constitution, any tax imposed upon the property from which the monies or income came, in the hands of some other, in any personal of representative capacity, by another or foreign State (New York), notwithstanding.

Therefore, the sums received by the Petitioner, Mrs. Mary T. Ryan, were duly and properly classified and taxed as income, under a valid and constitutional statute not vitiated for "double taxation," nor doing violence to the Fourteenth Amendment of the Constitution of the United States. The tax is established as correct and legal, and the petition dismissed. Order will be entered when presented in accord with this opinion.

Respectfully, Edward Meeks, Judge.

Amherst, Virginia, Sept. 25, 1936.

A Copy. Teste.

H. H. Wayt, Clerk.

[fol. 43] In Supreme Court of Appeals of Virginia

Minute Entry—September 14, 1937

This cause, was this day partly heard upon the transcript of the record of the order aforesaid and arguments of counsel, and continued until tomorrow morning for a further hearing.

Minute Entry—September 15, 1937

This cause, was this day fully heard upon the transcript of the record of the order aforesaid and arguments of counsel, but because the court here is not yet advised of the order to be entered in the premises, time is taken to consider thereof.

[fol. 44] IN SUPREME COURT OF APPEALS OF VIRGINIA

JUDGMENT—November 11, 1937

This cause, which is pending in this court at its place of session at Staunton, having been fully heard but not determined at said place of session, this day came here the parties by counsel, and the court having maturely considered the transcript of record of the order aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the order complained of. It is therefore considered that the same be, and is hereby, affirmed, and that the plaintiff in error pay to the defendant in error thirty dollars damages and also her costs by her expended about her defense herein.

Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Staunton, who will enter this order in the order book there and certify it to the said Circuit Court.

A Copy: Teste.

M. B. Watts, C. C.

IN SUPREME COURT OF APPEALS OF VIRGINIA

ORDER SUBSTITUTING PARTY PLAINTIFF—February 5, 1938

It being suggested to the court that since the appeal was taken in this case, the said Mary T. Ryan had departed this life, and that the Guaranty Trust Company has qualified as Executor of the Estate of the said Mary T. Ryan, deceased, and it being further suggested that it is the intention of the said Executor to file a petition for a Writ of Certiorari in the Supreme Court of the United States in this case to the action of this Court entered on November 11th, 1937, on motion of the said Executor it is ordered that this cause be revived in the name of said Executor, and that it be admitted as a party plaintiff in the place and stead of said Mary T. Ryan, now deceased.

Enter this:

Preston W. Campbell, Chief Justice, Supreme Court of Appeals of Virginia.

[fol. 45] IN SUPREME COURT OF APPEALS OF VIRGINIA

Present: All the Justices.

MARY T. RYAN

v.

COMMONWEALTH OF VIRGINIA

OPINION BY JUSTICE JOHN W. EGGLESTON—November 11, 1937

The petitioner, Mary T. Ryan, was during the years 1930, 1931, 1932, and for some time prior thereto, a legal resident of and domiciled in Nelson County, Virginia. During each of these years she received income from a trust, the corpus of which was held, managed, and controlled in New York, under the will of her husband, the late Thomas F. Ryan, who was at the time of his death a resident of that State. The income of the trust was derived from interest on bonds and dividends from corporations, and the share thereof to be paid to Mrs. Ryan was within the sole discretion of the trustees.

The State of New York assessed an income tax against the trustees on account of the income received by the trust during said years, including so much thereof as was paid to Mrs. Ryan. Virginia assessed an income tax against Mrs. Ryan on account of the income received by her from the New York trustees during each of said years. They paid the Virginia taxes under protest and in this proceeding seeks a refund. To the judgment of the Circuit Court of Nelson County denying the relief, this writ of error has been allowed.

No question is raised here as to whether the payments to Mrs. Ryan constitute income. Relief from the taxes is sought on two grounds:

(1) The Virginia statutes are not designed and intended to tax such income; and

(2) If the tax is within the Virginia statutes the assessment violates the due process clause of the Fourteenth Amendment to the Federal Constitution.

With respect to her first claim petitioner argues: That for the purpose of income taxation the Virginia statutes

classify taxpayers under the separate and distinct headings of (1) Individuals, (2) Corporations and Partnerships, and [fol. 46] (3) Estates and Trusts; that only sections 50 and 51 of the Tax Code deal with taxation relative to estates and trusts; that these sections specifically impose a tax on the entire income of a discretionary trust, such as this, against the trustee and not against the beneficiary; and that hence there is no legislative authority for the assessment of these taxes against Mrs. Ryan, the beneficiary of this trust.

There is no claim by the Commonwealth that it has power to levy taxes against the New York trustees who are beyond the taxable jurisdiction of Virginia.

Section 51 provides for the filing of returns by the fiduciary and throws no light on the question here under discussion.

The pertinent provisions of section 50 are as follows:

"Sec. 50. *Estates and Trusts.*—1. The tax imposed by this chapter upon individuals shall apply to estates and trusts, which tax is hereby levied annually upon and with respect to the income of estates or of any kind of property held in trust, including:

* * * * * * *

"d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, * * *

* * * * * * *

"3. In cases under paragraphs a, b and c of subdivision one, of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, * * *. In such cases, the estate or trust shall be allowed the same exemption as is allowed to single persons by this chapter, and in such cases an estate or trust created by a person not a resident, and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under this chapter.

"4. In cases under paragraphs d and e of subdivision one of this section, if the distribution of income is in the discretion of the fiduciary, either as to the beneficiaries to whom payable or as to the amounts to which any beneficiary

is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credited to any such beneficiary. * * *"

It is true that this section does not provide for the assessment of taxes against the beneficiary of a trust. Nor was [fol. 47] it designed for that purpose. The very reading of the section shows that it relates to the assessment of taxes against the trustee, that is, against the estate itself. The "tax is hereby levied annually upon and with respect to the *income of estates* or *of any kind of property held in trust,* * * *" (Italics supplied.) It is obviously designed to levy a tax on incomes received by a trust which is held, administered, and controlled in Virginia.

This section does not undertake to deal with the taxation of a beneficiary, such as Mrs. Ryan, who resides in Virginia and receives income from a trust held, managed, and controlled in another State.

But this does not mean that the Virginia statutes contemplate that no tax should be levied against Mrs. Ryan with respect to such income received by her.

We think the following provisions of the Tax Code authorize the levying of the tax here complained of:

"Sec. 24. *Definition of gross income.*—The term 'gross income,' as used herein, includes gains, profits and income derived from * * * rent, interest, dividends, securities or transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits and income derived through estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares. * * * *"

"Sec. 27. *Net income defined.*—The term 'net income' means the gross income of a taxpayer less the deductions allowed by this chapter; but the net income subject to the taxes imposed by this chapter shall be the net income less the personal exemptions allowed by this chapter."

"Sec. 38. *Individual income tax rates; residents and non-residents.*—A tax is hereby annually levied for each taxable year upon every resident individual of this State, upon and with respect to his entire net income as herein defined for purposes of taxation, at rates as follows:

* * * * * * * *

"The taxes levied by this chapter shall be assessed, collected and paid as provided by law."

"Sec. 41. *Who must file individual income tax returns and where.*—Every individual having a gross income for the taxable year of one thousand dollars or over, if unmarried, * * * shall make under oath a return stating specifically the items of his entire income and the items which he claims as deductions and exemptions allowed by this chapter.

[fol. 48] "Every resident individual who is required by this chapter to file a return shall file his return with the commissioner of the revenue for the county or city in which he resides, * * *"

Our conclusion is that the income of Mrs. Ryan from the trust comes within the definition of gross income in section 24, and that the tax is plainly authorized by section 38.

The petitioner next claims that even if the tax under review is authorized by the laws of Virginia, the assessment contravenes the due process clause of the Fourteenth Amendment.

She argues that the State of New York has levied a tax on the net income received by the trustees including such income as was paid to her; that the assessment of the Virginia income tax amounts to double taxation of her income; that double taxation has been condemned by the Supreme Court of the United States, as to tangible property in Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 S. Ct. 36, 50 L. Ed. 150; as to intangible property in Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed. 180, 67 A. L. R. 386; as to inheritance taxation in Farmers Loan & Trust Co. v. Minnesota, 280 U. S. 204, 50 S. Ct. 98, 74 L. Ed. 371, 65 A. L. R. 1000, First Nat'l Bank of Boston v. Maine, 284 U. S. 312, 52 S. Ct. 174, 76 L. Ed. 313, 77 A. L. R. 1401; and that the same reasoning which condemns double taxation of the above types of property applies to and invalidates double taxation of incomes.

While double taxation by two States of the same property was formerly expressly held not to be prohibited by the Fourteenth Amendment (Shaffer v. Carter, 252 U. S. 37, 38, 40 S. Ct. 221, 64 L. Ed. 445; Cream of Wheat Co. v. Grand Forks County, 253 U. S. 325, 330, 40 S. Ct. 558, 64

L. Ed. 931; Swiss Oil Corp. v. Shanks, 273 U. S. 407, 413, 47 S. Ct. 393, 71 L. Ed. 709), this doctrine has been repudiated with respect to property taxes levied in the case of tangibles, intangibles, and inheritance, as illustrated by the more recent cases relied on by petitioner and cited above. These recent cases have been lately approved in Senior v. Braden, 295 U. S. 422, 55 S. Ct. 800, 79 L. Ed. 1520, 100 A. L. R. 794, and in People of the State of New York v. Graves, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 409.

An analysis of these recent cases shows that each turns upon the determination of the situs of property for taxation. Where the situs is found to be beyond the jurisdiction of the State seeking to levy the tax, such tax is held to be prohibited by the due process clause of the Fourteenth Amendment. In each of the cases relied on by petitioner [fol. 49] the situs of the property was held to be beyond the jurisdiction of the taxing State and, therefore, in violation of the due process clause of the Fourteenth Amendment. And so in Commonwealth v. Appalachian Co., 159 Va. 462, 166 S. E. 461, we held that intangibles which had acquired a situs in New York, although owned by a Virginia corporation, could not be taxed in Virginia.

But the tax here under review is of a different nature. In Hunton v. Commonwealth, 166 Va. 229, 244, 183 S. E. 873, we held that the Virginia income tax is an excise tax and not a property tax; that it is not a tax on the property from which the income is derived, a view subsequently settled in People of the State of New York v. Graves, supra.

In no sense is the Virginia income tax levied on any property beyond the jurisdiction of this State. It is a tax levied upon Mrs. Ryan measured by the net income received and enjoyed by her here. She is subject to this tax in Virginia because she resides and is domiciled in this State, because she enjoys the protection of the laws of this State in the receipt and enjoyment of this income, and because she should bear her proportionate part of the expense of the government which affords this protection to her.

We think it is settled in Lawrence v. State Tax Commission, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A. L. R. 374, and in People of the State of New York v. Graves, supra, that the domicile and residence of the taxpayer in Virginia is a sufficient basis to sustain an income tax

although the income so received and enjoyed by the taxpayer may have originated in another State.

In Lawrence v. State Tax Commission, supra, the court, speaking through Mr. Justice Stone, upheld the constitutionality of a State income tax levied on a resident of Mississippi on account of income derived from business conducted by him in Tennessee. In disposing of the claim that the tax violated the due process clause of the Fourteenth Amendment the court said (286 U. S. pp. 280-1):

"It is enough, so far as the constitutional power of the state to levy it is concerned, that the tax is imposed by Mississippi on its own citizens with reference to the receipt and enjoyment of income derived from the conduct of business, regardless of the place where it is carried on. The tax, which is apportioned to the ability of the taxpayer to bear it, is founded upon the protection afforded to the recipient of the income by the state, in his person, in his right to [fol. 50] receive the income, and in his enjoyment of it when received. These are rights and privileges incident to his domicile in the state and to them the economic interest realized by the receipt of income or represented by the power to control it, bears a direct legal relationship."

In People of the State of New York v. Graves, supra, decided on March 1, 1937, it was held that the State of New York had the right to levy an income tax upon the recipient of income residing in that State, although such income was derived from rents from lands located in another State and from interest on mortgages secured by real estate in another State. The court, again speaking through Mr. Justice Stone, said (300 U. S., p. —):

"That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicile itself affords a basis for such taxation. Enjoyment of the privileges of residence in that state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the cost of government."

The opinion reaffirmed the doctrine laid down in Maguire v. Trefry, 253 U. S. 12, 40 S. Ct. 417, 64 L. Ed. 739, that the State wherein the taxpayer was domiciled had the

power to levy a tax on the "net income from bonds held in trust and administered in another state."

The court clearly pointed out that the income received by the taxpayer in New York is a taxable interest separate and distinct from the land located in New Jersey, from which the income is derived.

Senior v. Braden, supra, so strongly relied on by the petitioner, is not controlling here. There the court held invalid a property tax levied on certain certificates entitling the holder to portions of the rents derived from lands in another State. This was based on the finding that the certificates represented an equitable interest in the land itself, which was beyond the taxing jurisdiction of the State.

It is argued with considerable force by the Attorney-General that both the New York and the Virginia income taxes can be sustained since they are levied on different taxable interests. The New York tax, it is said, is incident to the receipt of the income by the trustees in that State, while the Virginia tax is based upon Mrs. Ryan's receipt [fol. 61] and enjoyment of the income in the latter State. The protection offered to the trustees and to the property handled by them in New York does not extend to the receipt and enjoyment of the income by Mrs. Ryan in Virginia. Each of these separate taxable interests should bear its proportionate part of the expenses of the governments of the respective States. Hence it is claimed neither of these taxable interests can complain of the levy on the other.

This argument finds some support, we think, in the reasoning in Lawrence v. State Tax Commission, supra, and in People of the State of New York v. Graves, supra. See also, 48 Harvard Law Review (1935), at pp. 416 and 430.

Whether this view is sound and whether the validity of the tax levied by the State of New York on the trustees can be sustained, we need not decide since the validity of that tax is not before us. What we do decide, and all we decide, is that the domicile and residence of Mrs. Ryan in the State of Virginia is sufficient to sustain the validity of the tax levied against her by this State.

The judgment is affirmed.

A Copy: Teste.

H. H. Wayt, Clerk.

IN SUPREME COURT OF APPEALS OF VIRGINIA

[Title omitted]

NOTICE OF PRÆCIPE FOR RECORD.

Please Take Notice:

That on the 10th day of February, 1938, we shall apply to the Clerk of the Supreme Court of Appeals of Virginia, for a certified copy of the record in the above case, for use [fol. 52] in connection with an appeal to the Supreme Court of the United States for a Writ of Certiorari in the said case.

Respectfully, Caskie & Frost, Attorneys for Guaranty Trust Company of New York, Executor of the Estate of Mary T. Ryan, Deceased.

Legal service of the above notice is hereby acknowledged this 5th day of February, 1938.

Henry R. Miller, Jr., Attorney for the Commonwealth of Virginia.

IN SUPREME COURT OF APPEALS OF VIRGINIA

CLERK'S CERTIFICATE.

I, H. H. Wayt, Clerk of the Supreme Court of Appeals of Virginia, at its place of session at Staunton, Virginia, do hereby certify that the foregoing (together with Exhibit 'A, the original of which is filed) constitutes a true, full and complete transcript of the record and proceedings, entitled in this court "Mary T. Ryan v. Commonwealth of Virginia," consisting of the following, to-wit:

First. Copy of the printed record, pp. 1-42 and index.
Second. Copy of order partly hearing the case.
Third. Copy of order fully hearing the case.
Fourth. Copy of order, judgment of the Court.
Fifth. Copy of order reviving the case in the name of the Executor.
Sixth. Copy of opinion of the Court.
Seventh. "Exhibit" "A"—Will of Thomas F. Ryan (original filed).

Eighth, Copy of notice to Commonwealth of Virginia that an appeal will be made to the Supreme Court of the United States for a Writ of Certiorari.

NOTE.—Exhibits "C," "D" and "E" mentioned in record are not available, not being on file in this court.

[fol. 53] In testimony whereof, I have hereto set my hand and affixed the seal of the said Supreme Court of Appeals of Virginia, this the 10th day of February, A. D. 1938.

H. H. Wayt, Clerk of the Supreme Court of Appeals of Virginia, at Its Place of Session at Staunton, Virginia.

[fol. 54] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed March 28, 1938

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the State of Virginia is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 42,292. Virginia, Supreme Court of Appeals. Term No. 811. Guaranty Trust Company of New York, Executor of the Estate of Mary T. Ryan, deceased, petitioner, vs. Commonwealth of Virginia. Petition for a writ of certiorari and exhibit thereto. Filed February 21, 1938. Term No. 811, O. T., 1937.

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No. [redacted] 9

Supreme Court of the United States

OCTOBER TERM, 1937.

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR OF THE ESTATE OF MARY T. RYAN, DECEASED,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA AND BRIEF IN SUPPORT THEREOF.

JAS. R. CASKIE, *Attorney for Petitioner.*

A. P. BELL COMPANY, INC., PRINTERS, LYNCHBURG, VIRGINIA

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PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

PETITION FOR A WRIT OF CERTIORARI.

May It Please the Court:

The petition of Guaranty Trust Company of New York, Executor of the Estate of Mary T. Ryan, deceased, respectfully shows to this Honorable Court:

A.

SUMMARY OF THE MATTER INVOLVED.

Your petitioner respectfully shows that it is aggrieved by the final judgment of the Supreme Court of Appeals of Virginia, rendered on the 27th day of November, 1937, in the cause of *Mary T. Ryan* (now deceased) v. *Commonwealth of Virginia*. By said judgment the Court upheld as valid, additional State income taxes aggregat-

ing $8,996.57 assessed against Mary T. Ryan on income received for the years 1930, 1931 and 1932.

The additional assessment had been paid under protest and action was instituted for a refund based on the contention (inter alia) that the assessment and taxes were invalid and unconstitutional under the provisions of the Fourteenth Amendment to the Constitution of the United States which protect against double taxation by one or more states of the same subject and against unjust and unfair discrimination against a beneficiary of a discretionary trust as compared with the beneficiaries of other or direct trusts.

For original petition see Record, page 24, and for Stipulation of Facts under which the matter was tried see Record, page 30.

Mary T. Ryan was a beneficiary of a trust set up under the will of Thomas F. Ryan, a resident of New York. The trust was set up under the laws of, and wholly managed, operated, and controlled in New York. (Rec., p. 32.) The will (Exhibit A with Record) divided the trust estate into fifty-four equal parts. It provided for the payment of the entire net income from prescribed numbers of such parts to designated beneficiaries, but in the provision for Mary T. Ryan (the wife of testator) Article Fourth, Subdivision F of said will provided that the trustees should pay over to the said wife so much of the income from twelve of said parts

> "as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life, in such installments and at such intervals as they in their sole discretion may determine." (See Stipulation of Facts, Rec., pp. 32-33.)

The Virginia law and the New York law dealing with taxation of Income on estates and trusts are identical in

terms. The New York law, being Section 365 of the New York Income Tax Law, is set out, Record, page 34. The pertinent portion of the Virginia Estate and Trust Income tax provision is found in Section 50 of the Virginia Tax Code (quoted in the opinion Rec., p. 46).

The decision of the Trial Court overruled the contention of the petitioner in that Court (Rec., pp. 35-36), which decision was affirmed by the Supreme Court of Appeals of Virginia. (Rec., pp. 43-44.)

Under the provisions of both the New York and Virginia laws the Trustees of a Trust estate pay no tax on income paid or payable to ordinary or direct beneficiaries, being allowed to deduct such income. As to income payable in the discretion of the trustees, however, the trustees are required to report and pay the tax on the entire net income to the state of the domicile of the trust.

It is stipulated that in the instant case the trustees were assessed by and paid to the State of New York for each of the years in question, income taxes on the entire net income from the 12/54th part of the trust estate provided for in the said Article Fourth, Subdivision F; of said will. (Rec., p. 32.)

Notwithstanding the assessment and payment of the tax in New York, the State of Virginia assessed and collected an additional tax for each of said years from Mary T. Ryan, on the identical income, State taxes on which had already been assessed by and paid to the State of New York by the Trustees (Rec., p. 31).

This Virginia tax was assessed under Sections 38, 41, 24 and 27 of the Virginia Tax Code providing for income taxes on individual residents of the State, the said Mary T. Ryan being a resident of Virginia. The pertinent portions of last said sections will be found quoted in the opinion of the Court (Rec., p. 47).

Since the appeal to the Supreme Court of Appeals of Virginia, Mary T. Ryan has died and by order of that Court entered on February 5, 1938, the case was revived and Petitioner was substituted as a party in her place and stead (Rec., p. 44).

B.

JURISDICTION.

This cause draws in question the validity of the Statutes of Virginia imposing the taxes involved, it being claimed that such statutes are repugnant to the rights, priviliges and immunities guaranteed by the Fourteenth Amendment to the Constitution of the United States. The judgment of the Highest Virginia Court in which a decision could be had, was in favor of the validity of said statutes, and the case thus comes within the specific provisions of Section 237 B of the Judicial Code of the United States, as amended by the Act of February 13, 1929, Chapter 229, 43 Stat. 937, authorizing review by this Court.

C.

THE ISSUE.

This petition presents the issue as to whether the State of Virginia has the right, under the provisions of the Fourteenth Amendment to the Constitution of the United States, to assess an income tax on income received by the said Mary T. Ryan for the years in question, when the identical income in the hands of her Trustees had been assessed with income taxes by the State of New York, and which said taxes had been paid there, thus imposing two State taxes on the same income.

D.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1.

Importance of the Question Involved.

The question of the right of two states to tax the identical income, one tax by the State of the domicile of the trust, and the other by the State of the domicile of the beneficiary, in case of a trust providing for payments to the beneficiary in the discretion of the Trustees is sought to be reviewed. The question is one of great importance, not only to the petitioner herein on account of the amount of the tax assessed in this case, and further on account of similar taxes for subsequent years, but is also important to the citizens of the country generally, similarly placed, and to the respective states, and is a question which in the judgment of the petitioner should be definitely settled by a decision in this Court.

The tax is of course an annual tax levied, or which would be levied in this case and any other cases of similar nature. Similar conditions, if not already existing, will doubtless be coming up from time to time in other jurisdictions.

Petitioner further claims that the decision of the Supreme Court of Appeals of Virginia, in upholding the right of Virginia to assess the second tax on the same income is contrary to and in conflict with decisions of this Court as hereinafter set out, and the matter should be reviewed by this Court to put the question at rest for the benefit of the citizens and of the various states.

2.

Applicable Decisions and Conflicts.

Petitioner has been unable to find any decision of this Court which directly decides the question involved. This

Court has decided in numerous cases that the Fourteenth Amendment to the Constitution of the United States prohibits the taxation by two or more states of the same subject, and that such double taxation deprives the owner of due process of law. (See *Union Refrigerator Company* v. *Kentucky*, 199 U. S. 194; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Safe Deposit & Trust Company* v. *Virginia*, 280 U. S. 83; *Farmers Loan & Trust Company* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *S. Carolina Tax Commission*, 282 U. S. 1; *First National Bank of Boston* v. *Maine*, 284 U. S. 312; *Senior* v. *Braden*, 295 U. S. 422.)

In the case of *Maguire* v. *Trefry*, 253 U. S. 12, this Court held that the state of residence of a beneficiary could tax income from a trust of another state *"to the extent that it had not been taxed by the state of the trust."* It thus did not involve a question of double taxation on the same income. Even this holding was disapproved by this Court in the case of *Senior* v. *Braden, supra*, which stated that the decision in *Maguire* v. *Trefry* followed the decision in *Blackstone* v. *Miller*, 188 U. S. 189; and *Fidelity Trust Company* v. *Louisville*, 245 U. S. 54, which cases had been disapproved by later decisions of the Court (being the decisions cited above).

The opinion of the Supreme Court of Appeals of Virginia (Rec., p. 45) recognized the effect of the above decisions with reference to double taxation (Rec., p. 48), but attempts to distinguish on the ground that an income tax is not a property tax but an excise tax.

It is submitted that this attempt is without merit, because (a) In a Constitutional sense an income tax is a direct rather than an excise tax, and (b) the prohibitions apply equally as well to excise taxes.

(a) In a Constitutional sense income tax is not an Excise tax.

This Court has held that for the purpose of determining the constitutional question, the name of the tax, or its nature, as construed by the State Court is immaterial, and that this Court will decide for itself as to the effect of the tax. *New Jersey Bell Telephone Company* v. *State Board*, 280 U. S. 338, 346-347; *Galveston* v. *Texas*, 210 U. S. 217, 227; *Quaker City Cab Company* v. *Pennsylvania*, 277 U. S. 389; *Macallen Company* v. *Massachusetts*, 279 U. S. 620, 625.

While generally coming within the class of excise taxes yet an income tax does not

> "fall within the class of excises, duties or imports, in the Constitutional sense, but is, in such a sense, a direct tax on property from which the income was 'derived',"

and the Court will disregard form and consider substance alone to prevent the violation of a Constitutional prohibition.

Brushaber v. *Union Pac. R. Co.*, 240 U. S. 1, at pp. 16-17, where the question is discussed. To same effect see *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429, 555-558, where the question is discussed.

(b) Constitution prohibitions apply equally to Excise taxes.

The same contention on the basis of Excise taxes was made and overruled by this Court in cases involving inheritance taxes (admittedly excise taxes).

See *Farmers Loan & Trust Co.* v. *Minnesota, supra*, and *First National Bank of Boston* v. *Maine, supra*.

The two cases chiefly relied on by the Virginia Court, viz.:

New York v. *Graves*, 300 U. S. 308, and *Lawrence* v. *State Tax Commission*, 286 U. S. 276 (Rec., pp. 49 and

50), are not applicable, nor do they have the force claimed. In neither case was there any double taxation by two states of the same subject.

In the *Graves* case one tax was on the principal asset and the other on the income—two subjects, and this was emphasized by the Court and determined the decision.

In the *Lawrence* case, no question of double taxation by two States was involved or suggested. The Court held that the State of Mississippi could tax the basic obligation from which the income was derived and so could tax the income therefrom.

It is submitted that the taxation by two states of the same income, under the decisions of this Court, comes within the prohibition of the Fourteenth Amendment.

3.

Discrimination.

Attention is called to the fact that under the construction of the New York and Virginia tax laws, identical in their terms as to estates and trusts, no beneficiary of a direct trust would pay the double taxation, whether residing in the same state of the trust, or in another state, since the trustee pays no tax on the income paid or payable to such beneficiary, being allowed to deduct from the total income all such income so paid or payable. In the case of the beneficiary of a discretionary trust residing in a different state than that of the trust, such income would always be subject to taxation by two separate states, thus destroying equality as between the two classes of beneficiaries, with no proper basis for such discrimination. The equal protection clause of the Fourteenth Amendment prohibits inequality in treatment of citizens. Decisions on this point will be found in the brief in support of petition filed herewith.

E.

Time of Application.

Attention is called to the fact that the instant case was pending at the Staunton Session of the Supreme Court of Appeals of Virginia, where it was heard. Decision was rendered at the Richmond Session on November 11, 1937. The order below was entered at Richmond on that date and certified to the Clerk at Staunton and entered in the Clerk's Office there in vacation on November 23, 1937. (Rec., pp. 43, 44.)

The authority of the Court to make the order at Richmond in vacation of the Staunton Session and certify it to the Clerk of Staunton is under Section 5871 of the Code of Virginia of 1919, the pertinent provision of which is as follows:

> "The Court (sic. Supreme Court of Appeals) at any place of session may enter any order or decree in any cause originally docketed at any other place of session which it could enter if in session at that place. When any such order or decree is made the Court shall have the same certified by the Clerk at the place where it is then sitting to the Clerk at the place where the cause was originally docketed, to be by him entered in the proper order book of the Court. All orders and decrees *when so made and entered shall have the same force and effect* as if made and entered in term." (Italics supplied.)

The federal statute U. S. C. title 28, Sec. 3501, provides that no appeal of writ of certiorari shall be entertained unless application therefor "within three months after the *entry* of such judgment or decree." (Italics supplied.)

Thus while the order was dated November 11, 1937, it was not entered until November 23, 1937, which last date is the determination date from which the time be-

gins to run. See *Puget Sound P. & L. Co.* v. *King County*, 264 U. S. 22, 24-25.

United States v. *Gormez*, 1 Wall. 690, 698.

In consideration of the above, your petitioner respectfully prays that a Writ of Certiorari be issued out of, and under the seal of this Honorable Court, directed to the Supreme Court of Appeals of Virginia, at Staunton, Virginia, commanding that Court to certify and to send to this Court for its review and determination, on such day as may be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket as No. 1918, Mary T. Ryan, Petitioner, Plaintiff in Error v. Commonwealth of Virginia, Defendant in Error, and that the judgment of the Supreme Court of Appeals of Virginia may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem proper and just, and your petitioner will ever pray.

GUARANTY TRUST COMPANY OF NEW YORK,

By JAMES R. CASKIE,
Attorney for Petitioner.

February 15, 1938.

Supreme Court of the United States

OCTOBER TERM, 1937.

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR OF THE ESTATE OF MARY T. RYAN, DECEASED,

PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,

RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI.

I.

THE OPINION OF THE COURT BELOW.

The majority opinion of the Supreme Court of Appeals of Virginia will probably appear in 169 Virginia. It is already printed in 193 S. E. (Adv. Ops.) 534. The opinion is set forth verbatim in the Record, beginning page 45.

II.

JURISDICTION.

1. The appellate jurisdiction of the Supreme Court of the United States is invoked under Section 237(b) of the Judicial Code of the United States, as amended by the Act of February 13, 1925 (28 U. S. C. A., Sec.

344 (b)), to correct error of the Supreme Court of Appeals of Virginia in the case just referred to under I.

2. Final judgment of the Supreme Court of Appeals of Virginia, which is the highest Court of the State of Virginia in which a decision could be had, was entered in the Supreme Court of Appeals at Staunton, Virginia, at which point the case was pending, on November 23, 1937. (Record, pages 43-44.)

3. The case at bar comes within the appellate jurisdiction of this Court under the said Section 237 (b) of the Judicial Code, by reason of the fact that there was drawn in question the validity of the Virginia statutes imposing a second tax on income previously taxed by the State of New York, thus imposing two State taxes on the same income, and also causing an unjust and unfair discrimination against the beneficiary of a discretionary trust, as compared with other beneficiaries, all contrary to the due process and equal privilege provisions of the first clause of the Fourteenth Amendment to the Constitution of the United States; and the decision of the State Court sustained the validity of the statutes. The case thus sets up a claim of a violation of the rights, privileges and immunities protected under the Constitution of the United States.

III.

STATEMENT OF THE CASE.

The facts are distinctly stated in the petition for Writ of Certiorari. Mary T. Ryan, a resident of Virginia, was the beneficiary under a trust set up under the laws of the State of New York, pursuant to the provisions of the will of Thomas F. Ryan, a resident of New York.

Under the law of New York, identical with the law of Virginia, trusts and estates are required to file reports for income taxes, such trusts being allowed credit

for income paid or payable to direct beneficiaries. As to income payable under the provisions of a trust in the discretion of the trustees, either as to amount or time of payments, the Trustees are required to pay an income tax to the state of domicile of the trust (in this case New York) on the total net income available for payments to the beneficiary. The Virginia law, sections 88, 41, 24 and 27 of the Virginia Tax Code (Rec., p. 47), provides for income taxes to be paid by residents, and Section 24 provides that the income shall include

> "gains or profit and income derived from estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares . . ."

Acting under these statutes applicable to resident individuals, the State of Virginia assessed against Mrs. Mary T. Ryan income taxes covering income received for the years 1930, 1931 and 1932, aggregating $8,996.57. The income was the identical income on which the Trustees had been assessed by the State of New York, and had paid income taxes for each of the years in question.

The case was heard under Stipulation of Facts (Rec., p. 30), which disclosed the above.

The claim of constitutionality of the assessment was based on decisions of this Court construing the due process and equal privilege provisions of the Fourteenth Amendment to the Constitution of the United States, which prohibit taxation by two or more states of the same subject and discrimination in taxation without logical and proper basis for classification.

IV.

SPECIFICATIONS OF ERROR.

1. The Supreme Court of Appeals of Virginia erred in holding that the Virginia statutes under which additional income taxes were assessed against Mary T. Ryan

for the years in question were valid and the tax assessed thereunder did not deprive the said Mary T. Ryan of privileges and immunities guaranteed by the Constitution of the United States.

2. The Supreme Court of Appeals of Virginia erred in affirming the decision of the lower Court, and in refusing to order a refund of the taxes which had been erroneously demanded of and paid by the said Mary T. Ryan.

3. The Supreme Court of Appeals of Virginia erred in holding that the said tax was valid on the grounds that it was an excise tax and not a property tax.

4. The Supreme Court of Appeals of Virginia erred in refusing to order a refund of the taxes paid as aforesaid.

V.

ARGUMENT.

The above four specifications of error all depend upon the question of the validity of the assessment of the income taxes by the State of Virginia under the provisions of the Due Process clause and Equal Privilege clauses of the Fourteenth Amendment to the Constitution of the United States, and can thus be treated jointly under the following heads:

A. The same income was subjected to taxation by two States.

B. The State of New York had the unquestionable right to levy the assessment, which thus prohibited the right in the State of Virginia.

C. The provisions of the Fourteenth Amendment protected against such taxation by both States on the same income (1) because forbidden by the Due Process clause to said Amendment; (2) because forbidden by the Equal Privilege clause to said Amendment.

A.

The same income was subjected to taxation by two States.

It is noted that the income assessment by the State of New York was made against, and required to be paid by the trustees of the trust estate under the provisions of the New York law, requiring such assessment and payment, where income was payable in the discretion of the trustees as to time and amount. In the case at bar, since Article IV, Subdivision F, of said will (Exhibit A) provided that the trustees should pay so much of the income from twelve-fifty-fourths of the trust estate to Mary T. Ryan (the wife of the testator), as the said trustees in their sole discretion might determine to be necessary and proper for her care, support and comfort during her life, and in such installments and at such intervals as they in their sole discretion might determine, the tax was properly assessed there.

The trust estate was set up under the will of Thomas F. Ryan, a resident of New York; the trustees were residents of New York; the trust estate was located in, managed, operated, and controlled in New York and under the laws of the State of New York. (See Stipulation of Facts, Rec., p. 82.)

It would seem that there can be no doubt of the right of the State of New York to tax income from the New York trust. It would have the unquestionable right to tax the basic assets, and Virginia would have no such rights, as was specifically decided in *Safe Deposit & Trust Company* v. *Virginia*, 280 U. S. 83, 74 L. Ed. 180, 50 S. Ct. 59. In the case of *Maguire* v. *Trefry*, 253 U. S. 12, 64 L. Ed. 739, 40 S. Ct. 417, the Court upheld the taxation by the State of Massachusetts on income received by a resident of that State, which arose from estate held in trust in Philadelphia "to the extent to

which it had not been taxed by the State of the trust." Thus, there was no double taxation involved.

In the case of *Senior* v. *Braden*, 295 U. S. 422, 79 L. Ed. 1520, 55 S. Ct. 800, the question involved was the right of the State of Ohio to levy a tax against the holder of beneficial interest in several properties conveyed to trustees, some within the State of Ohio, and some without. The tax involved was a tax based on income from these trust interests. The Court held that the tax was invalid, saying that the State being without power to tax interest in lands situated beyond its borders, it could not consistently with the due process clause tax as intangible property trust certificates representing interest in parcels of land which were outside of the State. In this *Senior* v. *Braden* case, the Court discussed the case of *Maguire* v. *Trefry*, and specifically disapproved that case, stating that it was based on *Blackstone* v. *Miller*, 188 U. S. 189, 47 L. Ed. 439, 23 S. Ct. 277; and *Fidelity & C. Trust Company* v. *Louisville*, 245 U. S. 54, 62 L. Ed. 145, 38 S. Ct. 40; and that those cases have been disapproved by *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 74 L. Ed. 371, 50 S. Ct. 98, and that they were not in harmony with *Safe Deposit & T. Co.* v. *Virginia*, 280 U. S. 83, 74 L. Ed. 180, 50 S. Ct. 59, and "views now accepted here in respect to double taxation." The effect of this decision in disapproving *Maguire* v. *Trefry*, was to hold that the assets of the trusts and income from the trusts were localized at the domicile of the trust, and taxable only there. Certainly, there is no suggestion, and could not well be, that the State in which the trust was domiciled could not tax, if it should so provide, both the assets and income of a trust. In fact, we know of no case in which any other contention has even been suggested, nor any one who has had the hardihood to make any contrary contention.

That the State of New York had the right to tax, there would seem to be no question, and thus if the Fourteenth Amendment is to protect against the taxation of the same income by two states, the Virginia taxation would be invalid.

The contention was made and suggested in the opinion of the Judge of the Circuit Court of Nelson County (Rec., p. 35), that the case is similar to the case of corporate dividends where the state of the domicile of the corporation levies a tax on its income, and the state of the residence of the stockholder taxes the stockholder on the dividends received from the corporation. The difference between the two is manifest. The corporation, as a separate entity, owns its assets and the stockholder has no right to the income of the corporation as such, as it can be used by the corporation for any corporate purposes, and the right of the stockholder only comes when the dividends are declared by the corporation, either out of the income of the particular year in question, or out of surplus. In the case of a trustee, the assets are really owned by the beneficiaries and the trustee merely acts as a fiduciary agent for the purpose of investment and collection of the income and distribution thereof. He has no right to withhold any part of the income, but it belongs to and must be paid to the beneficiary. In other words, the income of the corporation is not owned by the stockholders in the sense that it must be paid to them, while the income of the trust is owned by the beneficiaries and must be distributed to them. Thus, when the trustee pays a tax on income, he is paying a tax on property owned directly by the beneficiaries, and when another state assesses another tax, it is taxing the identical income which has already been taxed by the other state. It is true that in a broad sense the stockholders own the corporation, but it is only in a broad sense. They have no right to demand delivery of the entire net

income of the Corporation to them. The Corporation itself determines how much it will pay out in the way of dividends.

In the case of *Klein* v. *Board of Tax Supervisors*, 282 U. S. 19, at page 23, Mr. Justice Holmes states as follows:

> "There is no doubt that a state may tax a corporation and also tax the holders of its stock . . . the *owners are different* and . . . *the property is different.*" (Italics supplied.)

B.

The State of New York had the first, and thus the only right to levy the assessment.

This point is covered in the discussion last above, and is also involved in the discussion next below and must not be further treated here.

C.

The Due Process and Equal Privilege provisions of the Fourteenth Amendment forbid the tax.

1. The Due Process clause prohibition.

As stated in the petition for Writ of Certiorari, this Court has decided in numerous cases that the Fourteenth Amendment prohibits the taxation by two or more states of the same subject, and that such double taxation deprives the owner of due process of law. See *Union Refrigerator Company* v. *Kentucky*, 199 U. S. 194, 50 L. Ed. 150, 26 S. Ct. 36; *Frick* v. *Pennsylvania*, 268 U. S. 473, 69 L. Ed. 1058, 45 S. Ct. 603; *Safe Deposit & Trust Company* v. *Virginia*, 280 U. S. 83, 74 L. Ed. 180, 50 S. Ct. 59; *Farmers Loan & Trust Company* v. *Minnesota*, 280 U. S. 204, 74 L. Ed. 371, 50 S. Ct. 98; *Baldwin* v. *Missouri*, 281 U. S. 586, 74 L. Ed. 1056, 50 S. Ct. 436; *Beidler* v. *S. Carolina Tax Commission*,

282 U. S. 1, 75 L. Ed. 181, 51 S. Ct. 54; *First National Bank of Boston* v. *Maine*, 284 U. S. 312, 76 L. Ed. 318, 52 S. Ct. 174; and *Senior* v. *Braden*, 295 U. S. 422, 79 L. Ed. 1520, 55 S. Ct. 800.

As shown above, the taxation here is unquestionably based on the identical income. The only case we can find dealing with the question of taxation of income by the State of residence of a beneficiary of a trust, when such income is received from the trust of another state, is the case of *Maguire* v. *Trefry, supra*, which, as shown, held that the state of the residence of the beneficiary could tax income to *the extent that it had not been taxed by the state of the trust*, and which holding, however, *was disapproved*, as shown above, in the case of *Senior* v. *Braden, supra*.

The opinion of the Supreme Court of Appeals of Virginia recognized the authorities against the taxation by two states of the same subject, but attempted to evade the effect of these decisions on the ground that the taxation here is of a different nature, and that an analysis of the recent cases in this Court shows that each turns upon the *situs* of the property for taxation, that the tax in the instant case is an excise tax, and not a property tax, and therefore it does not come within the condemnation of the Fourteenth Amendment. For this position the opinion cites the cases of *Lawrence* v. *State Tax Commission*, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102; and *People of the State of New York* v. *Graves*, 300 U. S. 308, 57 S. Ct. 466, 81 L. Ed. 409. (See opinion Rec., pp. 49-50.)

The case at bar is not to be distinguished in principle from the decisions upholding the prohibitions of the Fourteenth Amendment against taxation by two states of the same subject, for the reason that, while income taxes are generally classed as excise taxes, yet in the Constitutional sense, they are regarded as direct taxes,

and further, because, even though an excise tax, the Court disregards the form and goes to the substance, in order to prevent an evasion of Constitutional prohibitions.

This Court has held in numerous cases, that *for the purpose of determining Constitutional questions*, the name of the tax, or its nature, as construed by the State Court, is immaterial, and that this Court will decide for itself as to the effect of the tax. See *New Jersey Bell Telephone Company* v. *State Board*, 280 U. S. 338, 346-347, 74 L. Ed. 463, 50 S. Ct. 111; *Macallen Co.* v. *Massachusetts*, 279 U. S. 620, 625, 73 L. Ed. 874, 49 S. Ct. 432; *Quaker City Cab Co.* v. *Pennsylvania*, 277 U. S. 389, 72 L. Ed. 927, 48 S. Ct. 553; *Galveston* v. *Texas*, 210 U. S. 217, 227, 52 L. Ed. 1031, 28 S. Ct. 638.

The same principle was announced in the case of *Senior* v. *Braden, supra*, where the Court said:

> "The validity of the tax under the Federal Constitution is challenged. Accordingly we must ascertain for ourselves upon what it was laid. Our concern is with realities and not with nomenclature." See page 429 of 295 U. S. and additional authorities there cited.

In the case of *Brushaber* v. *Union Pacific Railway Co.*, 240 U. S. 1, at pages 16-17, 67 L. Ed. 620, 43 S. Ct. 263, the question of an income tax as being an excise tax was discussed by the Court. The Court there said again that it would disregard form and consider substance alone to prevent the violation of Constitutional prohibitions, and that while income taxes *generally* come within the class of excise taxes, yet an income tax does not "fall within the class of excises, duties, or imports in the Constitutional sense, but is in such a sense a direct tax on property from which the income was derived." To the same effect see *Pollock* v. *Farmers Loan & Trust*

Company, 157 U. S. 429, 555-558, 39 L. Ed. 759, 15 S. Ct. 768.

Thus, from the above it clearly appears that in considering the question of constitutional prohibitions an income tax is not regarded as an excise tax, but is a direct tax on the property from which the income is derived. As the property was all located and taxed in New York, the Virginia tax on the income would in a constitutional sense be a tax on the property located in New York, and therefore invalid.

The prohibitions of the Constitution apply equally as well to taxes unquestionably classed as excise taxes, where the effect of such tax would be contrary to the Constitutional provisions.

The same effort to escape the effect of the Constitutional provisions on the ground that the taxes are excise and not property taxes has been advanced in other cases without success, as the Court under the above principal looks to the substance and not to the name or form.

In *Farmers Loan & Trust Company* v. *Minnesota*, *supra*, the tax was an inheritance tax, admittedly an excise tax. The specific contention was made that the tax was an excise tax, as of course in a general sense it was. The Court, in dealing with the question held that the right of any state to tax may depend somewhat upon the power of another state to tax. The concurring opinion of Mr. Justice Stone specifically held that the tax was an excise tax, or a privilege tax imposed for the transfer of intangibles. The decision in the case overruled the contention that the tax would be valid because an excise tax, and the opinion of Mr. Justice McReynolds states as follows:

> "Taxation is an intensely practical matter and laws in respect to it should be construed and applied with a view of avoiding, so far as possible, unjust and oppressive consequences. We have determined

> that in general intangibles may be properly taxed at the domicile of their owner and we can find no sufficient reason for saying that they are not entitled to enjoy an immunity against taxation any more than one placed similar to that accorded to tangibles. The difference between the two things, although obvious enough, seems insufficient to justify the harsh and oppressive discrimination against intangibles contended for on behalf of Minnesota."

The Court then held that the State of New York, having assessed its inheritance tax on the basis of the identical bonds involved in the case, the State of Minnesota could not assess a like excise tax on the basis of the same bonds, even though there might normally be a basis or jurisdiction to tax the transfer of debts owed by persons or corporations domiciled within its borders, or otherwise within its control.

In the case of *First National Bank of Boston* v. *Maine*, the same contention was raised, that the tax was an excise tax (this time on the stock of corporations incorporated in the State of Maine, which thus had jurisdiction to levy an excise inheritance tax on the transfer of such stocks). The opinion of the Court in that case referred to the case of *Farmers Loan & Trust Company* v. *Minnesota*, and adopted the same principles, saying that though stocks and bonds were different in their nature, yet the principles of law applied as well to stocks as to bonds, and though the stocks would have to be transferred in Maine, which would normally have the jurisdiction to tax, yet two excise inheritance taxes could not be assessed on the basis of the same assets.

Thus, in the instant case, while income tax is in the constitutional sense a direct and not an excise tax, yet if considered an excise tax, the principles enunciated would apply equally as well as they did in the two cases

cited last above. Otherwise there would be two excise taxes levied on the same identical income.

Certainly, there would appear to be no just reason why there should be a distinction against income, as compared with other property. Two taxations on income is just as unjust and oppressive in its consequences as two state taxes on any other property, or property rights.

It is submitted that the two cases cited by the Virginia Court in its effort to distinguish the instant case in principle from the decisions of this Court do not have the effect intended, and in fact do not militate against or conflict with the decisions of this Court with respect to two taxations on the same subject. The case of *Lawrence* v. *State Tax Commissioner, supra,* cited by the Virginia Court in its opinion (Rec., p. 49) involved the question of the right of the State of Mississippi to tax income received by its resident, a contractor, from work done in another state. No question of double taxation was involved. The decision of the Court simply held that Mississippi would have a right to tax the income (there being no suggestion that it had been taxed in the other state) and referred to the fact that the State of Mississippi would have had the right to tax the basic asset in the way of debt or obligation due to the resident of Mississippi for the work done in the other state, and that it could therefore naturally tax the income.

In the instant case it must be admitted that the State of Virginia would have no right to tax the basic assets from which the income was derived, and it would not be contended to the contrary. The Constitutional question involved here would only have been pertinent in the *Lawrence* case, if there had been attempt by both states to tax the same income, in which case the principle above referred to as enunciated in the case of *Farmers Loan & Trust Company* v. *Minnesota,* would have been brought

into operation, namely, that the right of one state to tax may depend somewhat upon the power of another to do so.

In *People of the State of New York* v. *Graves, supra*, cited by the Virginia Court, there was likewise no question of double taxation involved. In that case the property was located in another state. The owner lived in New York. The state of the locus of the property had assessed a property tax on the property itself, but nothing on the income. The State of New York had assessed an income tax against the owner, who was a resident of New York. The Court held, and properly held, that income and the basic property constituted separate subjects of taxation, and the fact that the other state had assessed a tax on the property itself did not prohibit the State of New York from assessing a tax against its resident on the income. That case would be pertinent and relevant to the case at bar, if the State of New York had assessed the basic assets (already assessed in the other state) and had not assessed on the income. In the case at bar the State of New York had assessed a tax on the income and Virginia assessed a *second tax* on *the same income.*

It is respectfully submitted that the effort of the Supreme Court of Virginia to differentiate the case at bar from the effect of the principles enunciated in the decisions of this Court cited above is ineffective, and that the contention of petitioner should have been upheld and the tax assessed by the State of Virginia should have been held invalid under those decisions.

(2) The tax is likewise invalid under the Equal Privilege clause of the Fourteenth Amendment.

In the instant case under the tax laws of both New York and Virginia, which are identical, trustees of trust estates must make up and file their income tax reports. They pay no tax, however, on income payable to or-

dinary beneficiaries. As to income payable in the discretion of the trustees, however, the trustees are required to pay income tax on the entire net income, and for each of the years in question the trustees in New York paid the tax on the income there. The State of Virginia, under the statutes applicable to resident individuals, imposed an income tax against Mrs. Ryan in respect to the same income, the tax on which had already been paid in New York. The two taxes resulted, not from specific requirement of double taxation, but from the effect of the operation of the law, in that the Virginia law for individual income taxes provides for a tax on the net income, including income from trusts. See Virginia Tax Code, Section 24 (Rec., p. 47). If this provision is carried to its logical conclusion, the result would be that Virginia itself would impose two taxes on the same income from a discretionary trust, since it would tax income in the hands of the trustee, under the specific provisions of the law with reference to trusts, and would then tax the beneficiary again, even though the trust were a Virginia trust and the beneficiary were a resident of Virginia. As against this, trust income payable to an ordinary beneficiary would be so subjected, whether the beneficiary received the income from a New York trust or from the Virginia trust, since it is provided that the Trustees may deduct from the income, the income paid or payable to such direct or ordinary beneficiaries.

It is respectfully submitted that there is no fair basis for differentiating between the income payable in the discretion of the trustees and income specified to be paid to other beneficiaries, and that such a result contravenes and is prohibited by the Equal Privilege clause of the Fourteenth Amendment to the Constitution.

Since the decision of this Court in *Bell's Gap Railroad Co.* v. *Pennsylvania*, 134 U. S. 232, 33 L. Ed. 599, 16 Sup. Ct. 448, clear and hostile discrimination without

proper basis has been held to be prohibited by the equal privilege clause. In that case Mr. Justice Bradley, speaking for the entire Court, while upholding the tax in that case, used the following language:

> "But clear and hostile discrimination against particular persons and classes, especially such as are of unusual character, unknown to the practice of our governments, might be obnoxious to the constitutional prohibition."

The Court has recognized the right of the states to classify subjects, provided the classification has a proper and logical basis, and to prescribe different taxes on such classifications. However, in *Gulf, etc. Ry. Co.* v. *Ellis*, 165 U. S. 150, 41 L. Ed. 666, 17 S. Ct. 255, this Court held that for such classification to be valid it

> "must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis."

This formula has been recited in a number of other cases, and has been applied in determining what difference in tax was based on proper classification and what was not.

In *Louisville Gas & Elec. Co.* v. *Coleman*, 277 U. S. 32, 72 L. Ed. 770, 48 S. Ct. 423, the question was as to the validity of a tax on recording of mortgages. It applied only to mortgages which did not mature within five years. The tax was attacked as contrary to the Equal Privilege clause of the Fourteenth Amendment. The Court held the tax invalid and laid down the rule in regard to legislative classifications, as follows:

> ". . . mere difference is not enough: the attempted classification 'must always rest upon some difference which bears a reasonable and just relation to

the act in respect to which the classification is proposed . . .'" page 87 of 277 U. S.

The Court said further, in reply to the contention that there was a difference in the privilege enjoyed, since the longer term mortgage enjoyed the privilege longer:

> "Certainly one who is secured by the state in the priority of his lien for a period less than five years enjoys a privilege which in kind and character fairly cannot be distinguished from one who enjoys a like privilege for a longer period of time. The former reasonably may be required to pay proportionately less than the latter; but to exact, as the price of a privilege which, for obvious reasons, neither safely can forego, a tax from the latter not imposed in any degree upon the former, produces an obvious and gross inequality."

In the case of *Concordia Fire Insurance Company* v. *Illinois*, 292 U. S. 535, 78 L. Ed. 1411, 54 S. Ct. 880, it was held that a statute taxing the net receipts of a foreign fire insurance company, could not validly be applied to receipts from casualty insurance because no similar tax was levied on the receipts of foreign casualty insurance corporations. The Court in this case enforced the same principles as set out above.

In the case of *Chalker* v. *Birmingham, etc. R. Co.*, 249 U. S. 522, 63 L. Ed. 748, the State of Tennessee attempted to levy a higher occupation tax upon construction companies whose principal offices were without the State than on similar companies whose offices were in the State. The Court could see no substantial difference in the methods of conducting the business, and hence held the statute unconstitutional under the equal privilege clause.

In the case of *Louis K. Liggett Company* v. *Lee*, 288 U. S. 517, 77 L. Ed. 929, 53 S. Ct. 481, the question of

a Florida chain store tax was involved. The Court upheld the tax graduation according to the number of stores, but on the second point in the case decided that the equal protection clause forbade the imposition of a higher tax on a chain operated in more than one county than upon a chain with the same number of outlets operated all in the same county. Mr. Justice Roberts, in the opinion, stated that this classification "finds no foundation in reason or in fact of business experience." (See page 584 of 288 U. S.)

This Court, in the case of *Stewart Dry Goods Company* v. *Lewis*, 294 U. S. 550, 79 L. Ed. 1054, 55 S. Ct. 525, held that the equal protection clause prohibited the statute invoked, which levied a tax upon gross receipts from all retail sales at rates varying according to the amount of sales. Mr. Justice Roberts wrote the opinion of Court, and pointed out that the classification was based upon a difference neither in the method of conducting a business nor in its nature, but solely upon variations in the total amount of sales made within a year. He said that to levy a higher tax upon a sale made in December than upon one made in January, or upon that of a large merchant than upon a small competitor, is "whimsical and arbitrary," as would be a progressive property tax upon land (see p. 557 of 294 U. S.).

In the case of *Binney* v. *Long*, 299 U. S. 280, 81 L. Ed. 239, 57 S. Ct. 201, the question involved was the validity of a classification in inheritance taxation, based upon the effective date of the dispositive instrument. One question raised was as to the validity of a tax upon the succession to property resulting from the failure of the donee to exercise a power of appointment created by a deed *inter vivos* in 1862. The Supreme Court held that to tax the successor to this interest would be to deny to him the equal protection of the laws, because the succession to a like interest created by a similar non tes-

tamentary gift made subsequent to 1907, would not be taxed at all. The Court could see no reasonable basis for this discrimination.

It is respectfully submitted that there is no proper basis for the discrimination in the case at bar against the beneficiary of a discretionary trust and the beneficiary of an ordinary trust. Both are ordinary citizens falling in the same class. They use their income and money in the same manner according as their judgments may dictate. There is thus no fair basis for the discrimination which becomes arbitrary, unjust, and oppressive, and therefore within the condemnation of the equal privilege clause of the Fourteenth Amendment.

CONCLUSION.

In consideration of all of the above, it is respectfully insisted that the case at bar is one calling for the exercise by this Court of its supervisory powers to correct the error of the Supreme Court of Appeals of Virginia, in deciding a Federal question of substance in a manner which is out of accord with the applicable decisions of this Court as above set out, and that Writ of Certiorari should be granted, to the end that this Court may review the decision of the Supreme Court of Appeals of Virginia, and reverse it.

Respectfully submitted.

JAMES R. CASKIE,

Attorney for Guaranty Trust Company of New York, Executor of the Estate of Mary T. Ryan, deceased.

Lynchburg, Va.,
February 15, 1938.

FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1938.

No. 9.

GUARANTY TRUST COMPANY OF NEW YORK, EXECUTOR OF THE ESTATE OF MARY T. RYAN, DECEASED,
PETITIONER,

v.

COMMONWEALTH OF VIRGINIA,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA.

REPLY BRIEF ON BEHALF OF PETITIONER.

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In this reply brief, we shall endeavor to treat seriatim the various matters under the subject headings, as set out in the Brief of Respondent, the figures after each referring to the pages of that brief.

STATEMENT OF THE CASE (pages 2-3).

In this statement the brief at page 3 states that the grounds relied on by Petitioner for relief were only two—viz.:

"First: The Virginia statutes were said not to have the intent of taxing the income paid Mrs.

Ryan from the New York trust (Record, pp. 3, 4) and

"Second: Even if the tax were intended, it was claimed that its levy violates the 'Due Process Clause' of the Constitution of the United States. (Rec., p. 15)."

Reference to the record pages cited will show that neither on page 3 or on page 15 did the "Second" ground mention the "Due Process Clause" but both claimed the tax as unconstitutional "under the Fourteenth Amendment to the Federal Constitution" (Rec., p. 3) and "Contrary to the Provisions of the Fourteenth Amendment to the Federal Constitution (Rec., p. 15).

It is true that it was stated (Rec., p. 15) that "The Fourteenth Amendment is what is usually referred to as the Due Process Clause." This statement is obviously inept since the Amendment has a number of clauses of which the Due Process Clause is only one.

The question as to whether the ground of violation of the Equal Protection Clause of that Amendment was raised in the Court below will be discussed in order under that head.

ARGUMENT.

I.

"The Petition Was Not Filed in Time," page 5.

We feel that but little need be said on this subject, beyond what was said in the "Petition for Writ of Certiorari," filed in this Court, at pp. 9 and 10.

The decisions of this Court cited on page 10 were dismissed with the mere statement that they do not apply. It is insisted that they do apply. In any event, the Virginia Statute Sec. 5871 (Petition, p. 9) would seem to conclude the question.

The Virginia Court under the statutes held separate and independent "Sessions" or Terms at different points, with separate and independent Clerks for each point. (See Brief in Opposition to Petition for Writ of Certiorari, p. 8). The instant case was at the Staunton Court of which the Clerk was H. H. Wayt who certified the record (Rec., p. 49). The case was decided and opinion rendered on November 11, 1937, in vacation of the Staunton Court, and at a term of the Richmond Court, of which M. B. Watts was Clerk (Rec., p. 42) and that Clerk, pursuant to the statute certified the order to the Clerk at Staunton where the final judgment was entered on November 23, 1937.

The statute (Sec. 5871) specifically provided that the Court might at any place of session "enter any order or decree in any cause originally docketed at any other place of session," and provided that when so made the order shall be certified by the Clerk, at the place where the Court is then sitting to the Clerk at the place where the cause was originally docketed, there to be entered on the proper order book and "When so made *and entered* shall have the same force and effect as if made and entered in term." (Italics supplied.)

The cause was not on the docket at Richmond, and was not pending there. It was pending and on the docket at the Staunton Court. Obviously, there could be entry of final judgment until entered where the case was pending and the statute so recognized and provided.

In view of the facts and the statute (Code Sec. 5371), we cannot follow nor do we see the relevancy of the argument or of the Rules of Court, which, incidentally, are not in this record, nor of Virginia Code section 6872, as set out on pages 5 and 6 of the Brief in Opposition to the granting of the Writ of Certiorari and dealing

with rehearings in the Virginia Court, except to call attention to the fact that the statute quoted, like section 5871, recognizes and requires the certifying to and entry of the judgment or order on the order book at the place of session *where the case be pending*.

II.

"The Due Process Clause of the Fourteenth Amendment," page 6.

A.

"Inherent Jurisdiction to Impose a tax on the entire net income . . .," etc., pages 7-12.

In the treatment of this subject, Attorneys for the Respondent apparently labor propositions not disputed or denied as *general* propositions viz.: that Income taxes are a valid method of taxation; that the receipt of income is a taxable event (whether such income be from sources within or without the State) and that domicile itself establishes a basis for taxation. However, all rights of taxation are subject to such limitations as the Constitution may prescribe.

It is the limiting effect of the Fourteenth Amendment, as repeatedly recognized by this Court, and as set out in the quoted case of *Lawrence* v. *Mississippi* (opposing brief p. 8), which is in issue here. The quotation, after setting out the right of a state to levy income taxes on its residents and that the Federal Constitution states no particular mode of taxation and States are thus left unrestricted in their power to tax those domiciled there, sets out that such rights exist only

> "so long as the tax is upon property within the state or on privileges enjoyed there, and *is not so*

palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment . . ." (Italics supplied.)

This is recognized in the opposing brief (p. 12) where the conclusion on this subject states that the argument is made "laying aside the question of double taxation"—and it might have been added—"and the question of equal privilege," or else should have read "laying side the question of the Fourteenth Amendment."

On pages 11 and 12, the attorneys for Respondent present the view that a net income tax is by the great weight of authority regarded as an excise and cites numerous authorities. This likewise is not denied as an *ordinary* proposition, and has been so recognized in decisions of this Court. However, for *Constitutional purposes* this Court has consistently refused to so classify it. In the case of *Lawrence* v. *Mississippi*, 286 U. S. 276, 280, 76 L. Ed. 1102, 1106, cited and relied on by Respondent, the Court specifically refused to so classify a net income tax for the constitutional question, though the State Court had so defined it (as was done by the Virginia Court in *Hunton* v. *Commonwealth*, 166 Va. 229, 244, 183 S. E. 878, as quoted on page 11 of Respondent's brief).

In the *Lawrence* case the Court, after referring to the State Court decision defining the tax as an excise, said "but in passing on its constitutionality we are concerned only with its practical operation, not its definition or the precise form of descriptive words which may be applied to it."

In this connection we refer also to the authorities cited on pages 20-21 of the Brief accompanying the Petition for Writ of Certiorari and which Brief is used as our opening brief in this case. The authorities there cited answer fully the contention on this question and

hold that the general classification of an income tax as an excise does not apply to constitutional questions and that for such questions an income tax does not—

> "fall within the class of excises, duties or imports in the Constitutional sense, but is in such sense a direct tax on property from which the income is derived."

B.

"The Inherent Jurisdiction of Virginia to impose a tax upon the Entire Net Income is not Defeated, Divested, or Ousted, etc." Pages 12-21.

At the outset, as shown above, the "inherent right" of Virginia is only *inherent* "so long as the tax imposed . . . is not so palpably arbitrary or unreasonable as to infringe on the Fourteenth Amendment . . .," or as recognized by the opposing brief is inherent only "laying aside the question of double taxation," i. e., laying aside the question of the Fourteenth Amendment. The Amendment is not to be "laid aside" as that is the question at issue here and to be decided.

It is not necessary here to discuss the moot question of whether "double taxation is *per se* bad and that this Court has said that the Fourteenth Amendment does not prohibit double taxation." This Court has held repeatedly and reiterated in the cases cited on page 13 of Respondent's brief and on pages 18-19 of the Brief in support of the Petition for Writ of Certiorari that—

> *"The Fourteenth Amendment prohibits taxation by two or more States of the same subject, and that such double taxation deprives the owner of due process of law"*

The attorneys for Respondents in their brief, at pages 14 and 15, refer to the four cases of *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v.

Missouri, 281 U. S. 586, *Beidler* v. *South Carolina*, 282 U. S. 1, and *First National Bank of Boston* v. *Maine*, 284 U. S. 312, as cases in which the Court applied the Fourteenth Amendment to forbid double taxation on "intangibles." Obviously they are in error for in none of these cases was the question of a property tax involved. All four involved an *excise tax*—i. e., death transfer, or succession tax, the amount of the tax being based on the value of the intangibles transferred, as is true of all such succession taxes.

As shown, for Constitutional questions an income tax is regarded not as an excise tax but as a property tax. and so double taxation by two or more states of the same subject would seem to come clearly within the protection of the Due Process Clause under the decisions cited.

Even if this last position be not accepted and the income tax should be held for Constitutional questions to be an excise, contrary to the decisions cited, Respondent would still be in no better position for the ruling applies equally as well to an Excise tax as to a property tax, as shown by the four cases cited last above. This would seem to be necessarily true, for the Fourteenth Amendment (Due Process and Equal Protection clause) is a general provision mentioning no specific subjects. Certainly, a citizen is entitled to due process and equal protection as much in respect to tax on income as to tax on property and double taxation is no less hurtful or objectionable on one than on the other and is necessarily subject to the same principles as to both.

It would seem that the principles announced in the decisions and which were successively applied to Tangible personal property (*Union Refrig. Co.* v. *Kentucky*, 109 U. S. 194 (1905); Tangible personal property which had acquired no situs elsewhere than at owner's domicile, though never physically present there (*Southern Pacific*

Co. v. *Kentucky*, 222 U. S. 68 (1911); Tangibles located permanently outside of the domiciliary State (*Frick* v. *Pennsylvania*, 268 U. S. 473 (1925); Intangibles (*Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83 (1929); Excise transfer tax on bonds of cities and residents of non domiciliary state (*Farmers Loan & Trust Co.* v. *Minn.*, 280 U. S. 204 (1930); Excise transfer tax on cash, credits, promissory notes and second mortgages due by residents of non domiciliary state and secured on property therein (*Baldwin* v. *Missouri*, 281 U. S. 586 (1930); Excise transfer tax on debt due by Corporation of non domiciliary state (*Beidler* v. *South Carolina*, 282 U. S. 1 (1931); and Excise transfer tax on stocks of Corporations of non domiciliary state (*First Nat'l Bank of Boston* v. *Maine*, 284 U. S. 312 (1932); would for like reasons and considerations apply equally as well to double taxation on income and that the effort to distinguish on the ground that the tax is an excise, which was urged without success in the four cases last cited, should be refused here even as it was in those cases, and even if it be considered as an excise for the question of Constitutional objections.

As has been already noted in our Brief in support of the Petition for Writ of Certiorari, the two cases of *Lawrence* v. *Mississippi*, 286 U. S. 276, and *New York ex rel Cohn.* v. *Graves*, 300 U. S. 308, in which Respondent places its chief reliance, while they do uphold the right of a State to tax income received from work done or property located in another state, yet they have no bearing on the question of double taxation, since no such question was involved in either case. It is not denied that a *basis* for taxation exists in the present case in the residence of Mrs. Ryan in Virginia. The fact that such basis exists cannot overrule the constitutional prohibition, which comes into effect only when two or more states, each with a basis for taxation, attempt to tax the

same subject, and until such attempt be made either state may on the strength of its basis apply its tax. In every one of the cases where the double taxation was prohibited each of the states had a clear basis for its tax, and the Court decided which had the prior and therefore the only right, where conflict actually existed. Not one of the cases was decided adversely to the claimant state on the ground of want of *basis* for its tax. In fact, if that be the test then the question of "double taxation" could not come into play, or be or any importance, for if there be no basis for the tax it would fall of its own weight, and the cases would have been decided on that want of basis for its tax rather than the question of violation of the Constitutional provision in oppressive and unreasonable double taxation.

The case of *Shaffer* v. *Carter*, 252 U. S. 37, cited on pages 7 and 18 was decided long before *Blackstone* v. *Miller* was overruled and before the double taxation cases cited above, from *Frick* v. *Pennsylvania* through *First National Bank of Boston* v. *Maine*, and has no bearing on the question here in view of the recent views of the Court on double taxation. No question of double taxation was involved.

In this connection it would seem proper to refer to the case of *Maguire* v. *Trefry*, 253 U. S. 12, and the subsequent treatment of that case in *Senior* v. *Braden*, 295 U. S. 422.

These two cases are fully discussed in the Petition for Writ of Error filed in the Virginia Court (Rec., pp. 15-18), to which we refer, and they need not be treated in detail here.

In *Maguire* v. *Trefry*, the Court sustained the right of Massachusetts to tax to one of its residents income received from a Pennsylvania trust *to the extent to which the income had not been taxed by the Home State of the Trust*. There was no question or suggestion in

that case that Massachusetts could have taxed income which had been taxed to the trust in Pennsylvania.

In *Senior* v. *Braden*, *Maguire* v. *Trefry* was discussed as to the holding above. The Court disapproved the Maguire case saying:

> "There the Massachusetts statute undertook to tax income; the securities (personalty) from which the income came were held in trust at Philadelphia; *income from securities taxable directly to the trustee was not within the statute.* The opinion accepted and followed the doctrine of *Blackstone* v. *Miller*, 188 U. S. 189, 47 L. ed. 439, 23 S. Ct. 277, and *Fidelity & C. Trust Co.* v. *Louisville*, 245 U. S. 54, 62 L. ed. 145, 38 S. Ct. 40, L. R. A. 1918 C. 124. These cases were disapproved by *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204, 74 L. ed. 371, 50 S. Ct. 98, 65 A. L. R. 386, *and views now accepted here in respect to double taxation.*" (Further cases cited.) Italics supplied.

For fuller discussion see Rec., pp. 15-18.

IS THERE "DOUBLE TAXATION" IN THIS CASE?

We cannot take seriously the contention that if there be a conflict of rights, Virginia should have priority over New York. The trust is a trust set up under the will of a resident of New York, made to New York Trustees, the assets are kept in New York, and the trust is managed and controlled in and under the laws of New York, and all the income is collected there. The effect of the case of *Maguire* v. *Trefry* (supra) clearly shows the prior right of the domiciliary State of the trust over the domiciliary State of the beneficiary and the effect of the disapproval in *Senior* v. *Braden* strengthens the priority of the State of the Trust, since the latter case disapproves the holding that the State of domicile of

the beneficiary could tax income from the trust even when not taxed in the State of domicile of the Trust. In short, the effect of the two decisions is to fix the situs for taxation of trust income in the State of the domicile of the trust and to prohibit its taxation in the other State.

This brings us to the contention that there is no "Double Taxation" in the Constitutional sense in this case as the taxes were assessed on different entities, i. e., the Trustees in New York and the beneficiary in Virginia.

It is submitted that for taxation purposes the Trustee and the beneficiary are one and the same and that a tax on the Trustee is a tax on the beneficiary who is in fact the beneficial owner of the entire net assets and income of the Trust. A Trustee is a mere fiduciary agent of the beneficiary. As said by this Court in *Gridley* v. *Wynant*, 23 How. 500, 502, 16 L. Ed. 411:

> "A trustee in equity is regarded in the light of an agent for the *Cestui qui trust*, and the authority confided to him is in the nature of a power."

Cited and quoted in *Insurance Co.* v. *Waller* (Tenn.) 95 S. W. 811, 815, 115 Am. St. Rep. 763, 7 Ann. Cas. 1078.

A trustee is one in whom some estate, interest or power in or affecting property of any description is vested for the benefit of another.

Taylor v. *Mayo*, 4 S. Ct. 147, 150, 110 U. S. 330, 28 L. Ed. 163; *Alleghaney Tank Car Co.* v. *Culbertson*, 288 F. 406, 410; *Catlett* v. *Hawthorne*, 157 Va. 372, 161 S. E. 47, 48.

The *cestui qui trust* is thus the beneficial or equitable owner of the net assets and income of the trust. Any charge against the income in the hands of the trustees directly and inevitably decreases the amount of the income which belongs to and must be paid to the *cestui qui trust*. The tax charged to the trustee does not effect

him or his income in any way—the tax is a direct tax on income belonging to the beneficiary and in actual effect and operation is a direct tax on the beneficiary as beneficial owner.

It is submitted that as to questions of taxation the Trustee and beneficiary are not to be distinguished and a tax on the Trustee is actually a tax on the beneficiary who, and who alone is the loser. So far as taxation is concerned, they are one and the same.

The case of a Trustee and beneficiary and the cases of Corporation and Stockholders, Profit on sale of stock on the New York Exchange by a resident of Virginia and a resident of one state earning income from personal services, as referred to on page 19 of Respondent's Brief are readily distinguishable.

In the case of Corporation and Stockholders, the Corporation is both legal and equitable owner of its assets and income; and manages and controls both as it may see fit; the stockholders have no ownership of the assets or net income, as such; the Corporation can and does use the income for such corporate purposes and objects as may be desired and the stockholder has no rights in such income as such; their rights are only to dividends out of income (or surplus) in such amount and as and when the Corporation deems advisable and wise to declare.

The reference to the case of sale of stock on the New York exchange is obviously inept. In such case there is no basis for tax in New York on the profit realized and no question of double taxation could arise.

Likewise the reference to the case of wages or salary earned in another state is inept. There the employee is not interested in or affected by taxes paid by the employer. He gets his full wage and no possible question of double taxation of the same subject arises unless both states attempt to tax the income to the employee. In

such case we would have the identical question at issue here. Under our contention only one state could tax the income and the Court would decide as to the priority of right as between the two states, just as this Court has done in all the "double taxation" cases referred to above.

Respondent's brief (pp. 13-14) suggests the difficulty of determining as to priority of right as between the states involved. Suffice it to say that constitutional rights of citizens will not be disregarded because of the *difficulty* in determining the rights as between the States. Furthermore, as shown above, in the decided cases on the question of "Due Process and Double Taxation," this Court has apparently perceived no such difficulty or if so has solved the difficulty and determined the question as to the right of priority.

III.

The Equal Protection Clause (p. 17, etc.).

The position of Respondent on this question is twofold:

First—That this defense was not raised in the Virginia Court, and

Second—That in any event our position is not sound.

First: The contention was made in the Virginia Court.

In the Virginia Court the position of petitioner was (a) that, when properly construed, the Virginia statutes did not authorize the imposition of the tax and (b) that if so it was forbidden by the "Fourteenth Amendment" to the Federal Constitution, which amendment contains both the Due Process Clause and the Equal Privilege Clause.

It is true that in the arguments made on the Constitutional question the "Due Process" clause was stressed,

and there was no *detailed separate* treatment of the Equal Privilege Clause. The reason for this was that the question of Equal Privilege was discussed under the argument as to the construction of the Virginia Statutes, and that to construe them as to impose the tax would violate the equal rights of Petitioner, in that it would impose on her as beneficiary of a discretionary trust double taxation which could not be and was not imposed on beneficiaries of an ordinary trust. This doubtless explains why the opinion of the Virginia Court did not deal separately with the Equal Privilege Clause under its treatment of the Constitutional question. It had decided against our contention as to equal rights under its treatment of the question of Construction of the Statutes. Apparently it practically ignored the constitutional point. In any event, we are not bound by what the Virginia Court said were our contentions; the record must speak on that question.

The Petition for Writ of Error filed in the Virginia Court did not specify any particular clause of the Fourteenth Amendment in the presentation of the "Questions before the Court," but stated (Rec., p. 3):

> "Second. If the statute be construed to make the income taxable in Virginia, it would be unconstitutional under the Fourteenth Amendment to the Federal Constitution."

In that Petition (Rec., p. 11) Petitioner called specific attention to the violation of the equal rights of Petitioner by the construction contended for by the Commonwealth.

Attention was again called in that Petition (Rec., p. 22) to the fact that to sustain the contention of the Commonwealth would, under the statute, be unconstitutional under the decisions of this Court.

We quote from the Reply Brief filed by the Petitioner in the Virginia Court. The concluding paragraph of that Brief is as follows:

> "It is respectfully submitted that the tax in this case is not authorized under the Virginia Statutes, when they are all read together and the obvious intent and purpose thereof are considered, and to hold otherwise would bring the tax in conflict with the Fourteenth Amendment of the Constitution, *both on the ground of double taxation and on the ground of discrimination against a beneficiary of a discretionary trust.*" (Italics supplied.)

That the defense of violation of the Equal Privilege Clause was made, whether considered by the Virginia Court, or not, seems clear.

Second: The Tax in Question Violates the Equal Privilege Clause of the Fourteenth Amendment.

We feel that this point has been sufficiently covered in our Brief accompanying the Petition for Writ of Certiorari, and that no sufficient answer has been made by Respondent in its treatment of the subject on pages 23 and 24 of its Brief. To sustain Respondent's view of the question where there is a Virginia discretionary trust and a Virginia beneficiary, it would be necessary to disregard the actual wording of the Virginia Statutes (Sections 24 and 50) and read into Section 24 (as we contended should have been done when the statutes were considered together), a qualifying phrase to make the last clause (see Respondent's Brief, Appendix, p. 27), read as follows:

> "including . . . income derived through estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares" *to the extent that such income has not been taxed to the Trust.* (Addition italicized.)

Our contention was that so far as Discretionary Trusts were concerned, Sections 50 and 51 of the Virginia Tax Code covered the field of income taxation as to income therein wholly taxed.

Our contention was resisted and overruled. Now Respondents apparently adopt it, certainly as to a Virginia Trust and a Virginia beneficiary. Otherwise, there would necessarily be a tax on both the Trustee and the beneficiary on the same income. Section 50(d)—(4) (Rec., pp. 44-45) requires the Trustee to pay tax on the income without deduction, and so it would be paid.

Section 88 (Rec., pp. 44-45) taxes individuals and Section 24 (Rec., p. 44) requires such individual to include in the gross income "income derived through estates or trusts." The statutes thus on their face would require the taxation of income paid to the beneficiary of a discretionary trust both to the trusts and to the beneficiary.

It was this consideration which actuated our contention that the qualifying phrase should be read into section 24, otherwise the statute would be discriminatory and violate both the Due Process Clause and the Equal Privilege Clause of the Fourteenth Amendment. The Virginia Court denied our Contention.

Respondent having contested our position and prevailed in the Virginia Court now apparently for the hearing here adopts it. They should not blow both hot and cold.

CONCLUSION.

It is submitted that the judgment of the Virginia Court should be reversed.

Respectfully submitted,

JAMES R. CASKIE,
Attorney for Petitioner.

Lynchburg, Va.

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Supreme Court of the United States

OCTOBER TERM, 1937

GUARANTY TRUST COMPANY OF NEW YORK,
EXECUTOR OF THE ESTATE OF MARY T. RYAN,
DECEASED, *Petitioner;*

vs.

COMMONWEALTH OF VIRGINIA, *Respondent.*

Brief on Behalf of the Commonwealth of Virginia in Opposition to the Granting of the Writ of Certiorari

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HENRY R. MILLER, JR.

Richmond, Virginia,
12th of March, 1938.

LEWIS PRINTING COMPANY, RICHMOND, VA.

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Brief on Behalf of the Commonwealth of Virginia in Opposition to the Granting of the Writ of Certiorari

It is respectfully submitted by the Attorney General of Virginia, on behalf of the Commonwealth of Virginia, that the petition for the writ of certiorari should be denied for the following reasons:

First: The petition was not filed in time;

Second: The lower court's decision is plainly right.

SUMMARY OF ARGUMENT

Final judgment of the court below was entered on November 11, 1937, and petition for writ of certiorari was filed in this court on February 21, 1938, more than three months subsequent to the entry of such final judgment. Therefore, writ of certiorari should be denied because not filed within the prescribed time.

Petitioner's decedent, Mrs. Mary T. Ryan, a resident of and domiciled in the State of Virginia, was during her lifetime assessed with a Virginia State income tax and included in the base of such tax was income received by Mrs. Ryan as beneficiary in part of a trust consisting of intangible property held, managed and controlled by New York trustees. The Virginia income tax is imposed upon its residents for the protection that they receive under its laws in their persons and in the receipt and enjoyment of their income and because they should bear their proportionate part of the expense of the government which affords this protection. The Virginia exaction is an excise tax imposed upon the person and not a tax upon property from which income may be derived. Mrs. Ryan was not denied due process of law by including in the base of the Virginia tax income received by her from the New York trust even though the trustees may have been taxed on account of the same income under the laws of New York, the jurisdiction of Virginia to impose its tax having been clearly established by this court, notably in *Lawrence* v. *Mississippi*, 286 U. S. 276, and *People of State of New York, ex rel. Cohn* v. *Graves*, 300 U. S. 308. The New York income tax on the trustees is imposed upon a different legal entity for different privileges and protection afforded under the laws of that State.

Denial of the equal protection of the laws was not raised or considered in the court below and should not be considered for the first time in this court. In any event, there is no denial of equal protection to Mrs. Ryan, since all persons similarly situated are taxed alike under Virginia law.

I

THE PETITION WAS NOT FILED IN TIME

The petition for the writ of certiorari was not filed in the Clerk's office of this court until the 21st of February, 1938.

It is respectfully asserted that the judgment complained of was entered on the 11th day of November, 1937, and that therefore the petition was not filed within the three months after the entry of that judgment as required by statute. R. S. 1008, as last amended by the Act of Feb. 13, 1925, c. 229, sec. 8 (a, b, d), 43 Stat. 940; 28 U. S. C. A. sec. 350. The three months period properly relates to the entry made on the 11th day of November, 1937, and that three months period ended on the 11th day of February, 1938, while the petition was not filed until the 21st day of February, 1938.

The Supreme Court of Appeals of Virginia has three places of session: One at Wytheville, one at Staunton and one at Richmond. Va. Code, 1919, section 5866. Cases arising in the Circuit Court of Nelson County, as this one did, are heard at the place of session of the Supreme Court of Appeals in Staunton. Va. Code, 1919, section 5869, as amended by Acts of Assembly, 1923, page 34.

This case was argued at Staunton, but the court took time to consider (R. 43) and then on the 11th day of

November, 1937, rendered its opinion (R. 45) at the place of the Richmond session and on the same day (R. 43, 44) directed the Clerk at Richmond to enter its order. It had authority to so enter its final order at Richmond, adjudicating the rights of the parties in a cause which was heard at Staunton. Sec. 5871 Va. Code, 1919, as quoted in petition for the writ, p. 9.

The last paragraph of the order (R. 44) so entered at Richmond on the 11th day of November, 1937, was as follows:

> "Which is ordered to be entered in the order book here and forthwith certified, together with a certified copy of the opinion in this case, to the clerk of this court at Staunton, who will enter this order in the order book there and certify it to the said Circuit Court."

The order of the 11th of November, 1937, was so certified to the Clerk at the place of session in Staunton in accordance with Section 5871 Va. Code, *supra*, and the record (page 43) shows the following:

> "IN VACATION:
>
> "In the Clerk's office of the Supreme Court of Appeals of Virginia at Staunton on Tuesday, the 23rd day of November, 1937.
>
> "The Clerk of the Supreme Court of Appeals of Virginia at Richmond certifies the following order in words and figures following, to wit:"
>
> [the order of the 11th of November, 1937, was then copied into the record at the Staunton office.]

The Clerk at Staunton simply spread upon his records the judgment which had been previously rendered and entered in Richmond. By the order of the 11th of November, 1937, the rights of the parties became conclusively fixed by the Supreme Court of Appeals of Virginia.

While no petition for a rehearing was filed in the Supreme Court of Appeals of Virginia, nevertheless, if one had been filed, it must have been filed within thirty days after the entry of the order in Richmond on the 11th of November, 1937. A petition for rehearing filed beyond the thirty days after the 11th of November, but within thirty days from the entry made at Staunton on the 23rd of November, 1937, would have been filed too late. This is plain from a reading of the Virginia statute (Va. Code, 1919, section 6372, as amended by Act of Assembly 1930, page 869), relating to such a petition for rehearing, which statute is as follows:

> **"Section 6372. When court of appeals may rehear and review case decided by it; when application therefor to be made; where rehearing, et cetera, to take place; where decision entered.** —The supreme court of appeals, on the application of a party, shall rehear and review any case decided by the said court if one of the judges who decides the case adversely to the applicant certifies that in his opinion there is good cause for such rehearing; provided, however, that the application or petition for rehearing be filed within thirty days after the entry of the judgment, with the court, if the court be in session, and if not in session, shall be filed with the clerk at the place of session where the judgment was entered, who shall note the date of such filing on the order book. Such rehearing and review may

be at any place of session, and the judgment, decree, or order made thereon shall be entered on the order book where it is made, and if not made at the place of session where the case was pending at the time it was originally determined, it shall be certified to the clerk of the court at the place of session where the case was originally pending as aforesaid, who shall forthwith enter the same on his order book and transmit a certified copy thereof to the clerk of the court below, to be by him entered as provided by section sixty-three hundred and sixty-nine."

The Rules of court refer to only one entry of a judgment or decree. This appears from a reading of Rule XVII, 167 Va. page XXXIII, where reference is to "the entry of the judgment or decree", not "the final entry", nor "the entry of the final judgment or decree", as would be the case if the court contemplated two or more entries.

The order of the 11th of November, 1937, was final for the purposes of the only rehearing available in the State courts and should be treated as final for the purpose of a petition for a writ of certiorari in this court.

The statutes of Virginia, as well as the Rules of the Supreme Court of Appeals of Virginia, refer to only one final entry and that is the one first made where the judgment was rendered.

The spreading of the order of the 11th of November on the books in Staunton on the 23rd of November was a mere ministerial act and did not fix or determine the rights of the parties to any extent. The Clerk at Staunton was not directed to certify the order of the 23rd of November, 1937, (for there was no such order), to the

Circuit Court, but was ordered to certify the order of the 11th of November, 1937, to the Circuit Court (R. 44). The only order entered was the order of the 11th of November and the only entry that conclusively fixed the rights of the parties was made on the 11th of November at Richmond.

When Chief Justice Campbell entered the order reviving the cause in the name of the Executor of the Estate of Mary T. Ryan, deceased, (R. 44) he understood that the rules of procedure and the law required that the petition for the writ of certiorari was being filed with respect to the action of his court "entered on November 11th, 1937". That was the entry that he referred to when he considered the matter as late as February 5th, 1938, the date of the entry of the order reviving the cause.

As to all of this, counsel for petitioner only says this, at bottom of page 9 of the Petition:

> "Thus while the order was dated November 11, 1937, it was not entered until November 23, 1937, which last date is the determination date from which the time begins to run."

It is difficult to reconcile his statement that the order was not entered until November 23 with the Record, pp. 43 and 44, which shows that on November 11th the opinion was rendered and the order pursuant thereto "ordered to be entered in the order book" at Richmond, and was so entered on the 11th of November. The court in its entry of its opinion of the 11th of November referred to the same as "this order", and in the order re-

viving the cause the court again referred to the action of the court "entered on November 11th, 1937."

Counsel for petitioner cannot, therefore, support his statement that the order was not entered until November 23, 1937.

Counsel for petitioner refers to two cases, *Puget Sound Power & Light Co.* v. *King County*, 264 U. S. 22, and *United States* v. *Gormez*, 1 Wall. 690. The facts in each of the two cases are entirely different from those here and it is not believed necessary to relate them here.

Wherefore it is smbmitted that the petition for a writ of certiorari was not filed in time and the writ should be denied for this reason.

II

THE LOWER COURT'S DECISION IS PLAINLY RIGHT

The four assignments of errors may be fairly treated as presenting two issues and it is respectfully submitted that the issues compel the following conclusions, namely:

A.

The Due Process Clause of the Fourteenth Amendment does not deny the right to Virginia to tax the income of its resident beneficiary, even though New York may have taxed the income of her resident trustees.

B.

The Virginia income tax against its resident beneficiary does not deny to her the equal protection of the law guaranteed her under the Fourteenth Amendment.

ARGUMENT ON THE MERITS

A.

The Due Process Clause of the Fourteenth Amendment does not deny the right to Virginia to tax the income of its resident beneficiary, even though New York may have taxed the income of her resident trustees.

Counsel for petitioner argues that New York has the unquestioned right to tax the Trustees on the income from the corpus in New York, and that the New York tax thereon precludes Virginia from taxing the income of the beneficiary. Such double taxation, he says, is forbidden by the Due Process Clause of the Fourteenth Amendment.

It is respectfully submitted that the decisions of this court approve Virginia's tax on Mrs. Ryan's income.

The argument of petitioner's counsel is based upon the premise that if two states tax the same income, (although the two taxes are levied against different legal entities for different privileges and protection afforded to each of them), one of the taxes violates the due process of law clause of the Fourteenth Amendment. That premise is not conceded by the Commonwealth of Virginia and it is submitted that the decisions of this

court show the premise to be unsound as applied to the facts of the instant case.

The New York tax on the trustees, based on the income received by them, is supported because the trustees and the corpus of the trust enjoyed the protection and privileges afforded them in New York by the New York laws. Such enjoyment is sufficient to sustain the New York Tax. *Lawrence* v. *Mississippi*, 286 U. S. 276.

On the other hand, the Virginia tax against petitioner is also supported by the same authority for the reason that it is based on her domicile and actual residence in Virginia. She was afforded by Virginia the protection in her person, in her right to receive the income and in the enjoyment of the income when received.

This court has already said that it could find no basis for holding that taxation of the income at the domicile of the recipient is within the purview of the rule now established that tangibles located outside the State of the owner are not subject to taxation within it. *Lawrence* v. *Mississippi, supra.*

On the other hand, counsel for petitioner in his brief on pages 15 and 16, on this point, discusses *Senior* v. *Braden*, 295 U. S. 422, *Maguire* v. *Trefry*, 253 U. S. 12, *Blackstone* v. *Miller*, 188 U. S. 189, *Fidelity & C. Trust Co.* v. *Louisville*, 245 U. S. 54, *Farmers Loan and Trust Co.* v. *Minnesota*, 280 U. S. 204, and *Safe Deposit and Trust Co.* v. *Virginia*, 280 U. S. 83, none of which cases involved an income tax, and draws the single conclusion therefrom by saying that the effect of *Senior* v. *Braden*, *supra*, "in disapproving *Maguire* v. *Trefry*, *supra*, was to hold that the assets of the trust and income from the trusts were localized at the domicile of the trust, and taxable only there" (Petition, p. 16).

The conclusion that the income was taxable only at the domicile of the trust loses its strength when it is considered that, so far as a diligent search reveals, no court has yet said that the same principles that are applicable to taxation of real estate, tangible property and intangible propery, govern also the taxation of income.

If the problem could be so readily solved, the difficulties of the forty-eight states would quickly disappear. There was a similar problem before this court in relation to inheritance taxes with respect to stocks in *First National Bank of Boston* v. *Maine*, 284 U. S. 312.

Mr. Justice Sutherland there (284 U. S. 328) put the question and answer as follows:

> "In which state, among two or more claiming the power to impose the tax, does the taxable event occur? In the case of tangible personalty, the solution is simple: * * * In the case of intangibles, the problem is not so readily solved, since intangibles ordinarily have no actual situs."

While this court had such difficulty in fixing the situs of intangibles for inheritance tax purposes, counsel for petitioner unhesitatingly and rather dogmatically concludes, from a discussion of cases involving the taxation of property only, that income from a trust has only one situs, which is that of the corpus, and is taxable only in the State in which the corpus of the trust is located. Are the three leading income tax cases, *Lawrence* v. *Mississippi*, *supra*, *Shaffer* v. *Carter*, 252 U. S. 37, and *People of State of N. Y. ex rel Cohn* v. *Graves*, 300 U. S. 308, and their doctrines as to taxation of incomes, to be so readily overthrown by principles announced in

cases involving property? The last of these three cases was decided as late as March 1, 1937, and discussed the principles of the other two cases, as well as the other cases relied on by counsel for petitioner. And yet this court has not said anything which justifies the view that income has only one situs for tax purposes. It is respectfully submitted that income taxes are unique and require different governing principles.

Mr. Justice Eggleston, speaking for the court below, (R. 49) argues conclusively on this point as follows:

> "In *Hunton* v. *Commonwealth*, 166 Va. 229, 244, 183 S. E. 873, we held that the Virginia income tax is an excise tax and not a property tax; that it is not a tax on the property from which the income is derived, a view subsequently settled in *People of the State of New York* v. *Graves, supra.*
>
> "In no sense is the Virginia income tax levied on any property beyond the jurisdiction of this State. It is a tax levied upon Mrs. Ryan measured by the net income received and enjoyed by her here. She is subject to this tax in Virginia because she resides and is domiciled in this State, because she enjoys the protection of the laws of this State in the receipt and enjoyment of this income, and because she should bear her proportionate part of the expense of the government which affords this protection to her.
>
> "We think it is settled in *Lawrence* v. *State Tax Commission, 286 U. S. 276, 52 S. Ct. 556, 76 L. Ed. 1102, 87 A. L. R. 374,* and in *People of the State of New York* v. *Graves, supra,* that the domicile and residence of the taxpayer in Virginia is a sufficient basis to sustain an income tax although the income so received and enjoyed by the taxpayer may have originated in another State."

Again from the same opinion, (R. 50-51):

> "It is argued with considerable force by the Attorney-General that both the New York and the Virginia income taxes can be sustained since they are levied on different taxable interests. The New York tax, it is said, is incident to the receipt of the income by the trustees in that State, while the Virginia tax is based upon Mrs. Ryan's receipt and enjoyment of the income in the latter State. The protection offered to the trustees and to the property handled by them in New York does not extend to the receipt and enjoyment of the income by Mrs. Ryan in Virginia. Each of these separate taxable interests should bear its proportionate part of the expenses of the governments of the respective States. Hence it is claimed neither of these taxable interests can complain of the levy on the other."

If the other view is to prevail, and only one State is to tax income, by what rule can it be determined which is the proper State to tax it? Certainly priority in the time of levying the tax cannot be the controlling factor, although this record discloses no such priority in favor of either state.

Which State has the prior right to the income tax? The State which protects the property and the custodian of the property, or the State which protects the recipient of the income in the right and enjoyment thereof and in her person?

Is the State of the domicile of the stockholder to be denied its income tax on the dividends, because the corporation is located in another State that taxes the corporation on its income?

Is the State of the domicile of the vendor to be denied its income tax on the vendor who sells at a profit real estate located in another State, because that other State taxes the real estate or the income therefrom?

Is the State of the domicile of the landlord to be denied its income tax on the rents from lands located in another State, because that other State taxes the lands or the income therefrom?

Is not the answer to each question: "Each State may tax those persons and properties that are within its jurisdiction, whether the taxes be laid on the income received by its citizens from property beyond its borders or upon income arising out of and received by its citizens from property within its borders". *Lawrence* v. *Mississippi, supra,* is authority for such an answer.

This court, 286 U. S. 279-280, has said this:

> "The Federal Constitution imposes on the States no particular modes of taxation, and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the States unrestricted in their power to tax those domiciled within them, so long as the tax imposed is upon property within the State or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment."

It is respectfully submitted that this question has been already decided by *Cohn* v. *Graves, supra*. In that case New York imposed an income tax on one of its residents upon income received from rents of land located

in New Jersey and from interest on bonds physically without the State and secured by mortgages upon lands similarly situated.

It is proper to take issue here with counsel for petitioner in his statement found on page 16 of his brief, where it is said

> "In this *Senior* v. *Braden* case, the court discussed the case of *Maguire* v. *Trefry*, and specifically disapproved that case."

In that case, involving a tax on a property interest in real estate, the court simply said "*Maguire* v. *Trefry* much relied upon by appellees, does not support their position". 295 U. S. 431. Later, however, this court said, in *People ex rel Cohn* v. *Graves, supra,* at page 313:

> "It [a state] may tax net income from bonds held in trust and administered in another State, *Maguire* v. *Trefry, supra,* although the taxpayer's equitable interest may not be subjected to the tax, *Safe Deposit & Trust Co.* v. *Virginia, supra.*"

Again, in *People ex rel Cohn* v. *Graves, supra,* at 300 U. S. p. 316, this court said:

> "Here the subject of the tax is the receipt of income by a resident of the taxing State, and is within its taxing power, even though derived from property beyond its reach."

That statement is still the law as applied to the same state of facts which also exist here. That case was cited

in the court below by counsel for petitioner as authority that this court "has expressly and plainly taken and stated the view that the same subject matter cannot be taxed by two or more States under the due process clause" (R. bot. p. 18). This statement was challenged by counsel for the Commonwealth of Virginia and the court below took a different view of the case, and relied on the case. It is still insisted that the lower court's opinion of the application of *Cohn* v. *Graves*, *supra*, is sound. The effect of petitioner's argument is that the New York income tax on the income from New Jersey real estate, sustained in *Cohn* v. *Graves*, *supra*, would immediately become invalid should New Jersey impose an income tax on the income from this real estate. It is not believed that the decisions of this court on important constitutional principles rest upon such insecure foundations.

The Fourteenth Amendment should not be so construed as to forbid the Virginia income tax on its resident beneficiary because the income arises from a New York trust account and there has been a New York income tax on the New York trustees. Each State should be permitted to tax those domiciled therein and to base the tax on privileges enjoyed therein, although measured by the same amount of income. The measuring stick is the same, but the characters of the measured privileges are different and the taxable subjects are in different jurisdictions.

B.

The Virginia Income tax against its resident beneficiary does not deny to her the equal protection of the law guaranteed her under the Fourteenth Amendment.

The question raised on page 24 of Brief in support of the petition for the writ of certiorari had not been previously raised or considered in this case. It does not appear in the record and the lower court did not pass upon it. Even now it is presented in a somewhat vague manner by opposing counsel. It is said on page 24 of his petition:

> "The tax is likewise invalid under the Equal Privilege clause of the Fourteenth Amendment."

In the lower court, the only federal question was presented by counsel for petitioner in the following manner, at page 15 of the Record:

> "SECOND. THE ASSESSMENT HERE IF JUSTIFIED UNDER THE VIRGINIA LAW WOULD BE CONTRARY TO THE PROVISIONS OF THE FOURTEENTH AMENDMENT TO THE FEDERAL CONSTITUTION.
>
> "The Fourteenth Amendment is what is usually referred to as the Due Process Clause. This point depends upon Federal decisions and the *situs* of the income for taxation purposes."

Petitioner's counsel then proceeded to argue the point that the tax in New York and the tax in Virginia was

such double taxation of income as was in violation of the Due Process Clause of the Fourteenth Amendment. At no time prior to his brief in support of his petition for the writ of certiorari was there presented the point that the tax on Mrs. Ryan by Virginia and the exemption under Virginia law of a Virginia tax on the Virginia resident beneficiary of a Virginia trust, not of a New York trust, denies to Mrs. Ryan the equal protection afforded a Virginia resident under other conditions.

It is hereinafter shown that there is no denial of equal protection, but the point is emphatically made that the Virginia courts have not had presented to them, nor has either of them passed upon, this federal question.

The only federal question raised and certainly the only federal question decided appears from the lower court's opinion, R. 51, from which the following is quoted:

> "What we do decide and all we decide is that the domicile and residence of Mrs. Ryan in the State of Virginia is sufficient to sustain the validity of the tax levied against her by this State."

The opinion of the lower court showed the issues to be, on page 45 of the Record, as follows:

> "Relief from the taxes is sought on two grounds:
> "(1) The Virginia statutes are not designed and intended to tax such income; and
> "(2) If the tax is within the Virginia statutes the assessment violates the due process clause of the Fourteenth Amendment to the Federal Constitution."

Nowhere below was there any mention of the "Equal Privilege Clause", or of the Equal Protection of the Law Clause.

Hence this court should not consider the question now.

Saltonstall v. *Saltonstall*, 276 U. S. 260, 268;
Silver v. *Silver*, 280 U. S. 117, 122;
Northwestern Bell Telephone Co. v. *Nebraska State Ry. Commission*, 297 U. S. 471, 473;
Susquehanna Power Co. v. *State Tax Comr. of Maryland*, 283 U. S. 291, 297;
Aero Mayflower Transit Co. v. *Georgia Public Service Comn.*, 295 U. S. 285, 294.

This federal question, if considered on its merits, should not justify a writ of certiorari.

The counsel for petitioner argues that the New York and Virginia laws with respect to estates are similar; that in neither State is there a tax imposed upon a beneficiary who gets income from a trust when the trustee has discretion as to the amount of the income; that Virginia taxes Mrs. Ryan now, but if the trust had been a Virginia trust no tax would have been imposed upon Mrs. Ryan (although the income would have been taxed to the trustee) and hence she has been denied the equal protection of the law that would be afforded her had the trust been a Virginia trust.

The answer that is sufficient to this argument is simply that this court does not deal in hypothetical cases and there is no such case in reality before this court now. *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, 54.

All persons situated like Mrs. Ryan are taxed alike, even though persons situated differently may be taxed

differently. There is absolutely nothing in the record to show the denial of equal protection of the law to Mrs. Ryan.

CONCLUSION

It is therefore respectfully submitted that this case is not one calling for the exercise by this court of its supervisory powers, for the following reasons:

(1) The petition for the writ was not filed within the time required by law; and

(2) No right, title, privilege or immunity under the Fourteenth Amendment of the Constitution of the United States has been denied to petitioner.

Wherefore, the petition for the writ of certiorari should be denied.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General of Virginia.
W. W. MARTIN,
Assistant Attorney General.
HENRY R. MILLER, JR.

Richmond, Virginia,
12th of March, 1938.

Supreme Court of the United States

OCTOBER TERM, 1938

No. 9

GUARANTY TRUST COMPANY OF NEW YORK,
EXECUTOR OF THE ESTATE OF MARY T. RYAN,
DECEASED, *Petitioner*,

vs.

COMMONWEALTH OF VIRGINIA

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE COMMONWEALTH OF VIRGINIA.

Brief on Behalf of Commonwealth of Virginia

ABRAM P. STAPLES,
Attorney General of Virginia,
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Assistant Attorney General.

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OPINION BELOW

The opinion below is officially reported in Volume 169, of the Virginia Reports, beginning at page 414, under the style of *Mary T. Ryan* v. *Commonwealth of Virginia.*

STATEMENT OF THE CASE

Mrs. Mary T. Ryan, widow of Thomas F. Ryan, for a number of years prior to her death[1] maintained her actual and her legal residence in Virginia (R. p. 30). During these years she received income from a trust, composed of stocks and bonds, held, managed and controlled by a trustee in New York under the will of Mr. Ryan probated in New York as the will of a resident of that State (R. pp. 30, 31, 32).

Mrs. Ryan's only interest in the trust was the right to receive a part of the income therefrom under the following conditions:

> "Twelve (12) of said equal parts to said Trustees in trust to receive the income therefrom, and to pay over such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life, in such installments and at such intervals as they in their sole discretion may determine" (R. p. 32).

New York assessed a State income tax against the trustees on the entire net income of the trust, out of which income the payments were made to Mrs. Ryan (R. p. 32). Virginia assessed ordinary State income taxes against Mrs. Ryan on account of that portion of the income paid her by the New York trustees. The Virginia taxes were paid and a refund was sought in the Circuit Court of Nelson County, Virginia, under ap-

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[1]The taxes here involved were assessed against Mrs. Ryan during her lifetime. After the decision of the court below Mrs. Ryan died, and by order of the Supreme Court of Appeals of Virginia the cause was revived in the name of her executor, Guaranty Trust Company of New York (R. p. 42).

propriate statutes. Relief was denied by that court and its judgment was affirmed by the Supreme Court of Appeals of Virginia. This court granted certiorari March 28, 1938.

Relief was sought in the court below on two grounds, after counsel for petitioner had abandoned two other grounds advanced in the original petition. These two grounds relied on in the court below were:

First: The Virginia statutes were said not to have the intent of taxing the income paid Mrs. Ryan from the New York trust (R. pp. 3, 4) and

Second: Even if the tax were intended, it was claimed that its levy violates the "Due Process Clause" of the Constitution of the United States (R. p. 15).

The first ground, involving solely a question of the construction of Virginia statutes and having been decided adversely to petitioner by the court below, is, of course, not advanced here.

Petitioner now relies on the second ground advanced in the court below, and further contends that Virginia's tax against Mrs. Ryan constitutes a denial to her of the equal protection of the laws. This latter contention was not raised, considered or argued in the court below.

STATUTES INVOLVED

Many sections of the Tax Code of Virginia bear upon the assessments, but it is sufficient here to refer to the following:

Section 24, (Michie's Code of Virginia, 1936, p. 2404)
Section 27, (Id. p. 2405)

Section 38, (Id. p. 2407)
Section 39, (Id. p. 2408)
Section 40, (Id. p. 2408)
Section 50, (Id. p. 2410)

Pertinent portions of these sections are printed in an appendix hereto.

SUMMARY OF ARGUMENT

Final judgment of the court below was entered on November 11, 1937, and petition for writ of certiorari was filed in this court on February 21, 1938, more than three months subsequent to the entry of such final judgment. Therefore, writ of certiorari should be dismissed because the petition was not filed within the time prescribed by law.

Petitioner's decedent, Mrs. Mary T. Ryan, a resident of and domiciled in the State of Virginia, was during her lifetime assessed with a Virginia State income tax and included in the base of such tax was income received by Mrs. Ryan as beneficiary in part of a trust consisting of intangible property, held, managed and controlled by New York trustees. The Virginia income tax is imposed upon its residents for the protection that they receive under its laws in their persons and in the receipt and enjoyment of their income and because they should bear their proportionate part of the expense of the government which affords this protection. The Virginia exaction is an excise tax imposed upon the person and not a tax upon property from which income may be derived. Mrs. Ryan was not denied due process of law by including in the base of the Virginia tax income received by her from the New York trust, even though the trustees may have been taxed on account of the en-

tire income from the trust under the laws of New York, the jurisdiction of Virginia to impose its tax having been clearly established by this court, notably in *Lawrence* v. *Mississippi*, 286 U. S. 276, and *New York, ex rel. Cohn* v. *Graves*, 300 U. S. 308. The New York income tax on the trustees is imposed upon a different legal entity for different privileges and protection afforded under the laws of that State.

Denial of the equal protection of the laws was not raised or considered in the court below and should not be considered for the first time in this court. In any event, there is no denial of equal protection to Mrs. Ryan, since all persons similarly situated are taxed alike under Virginia law.

ARGUMENT

I.

The Petition Was Not Filed in Time

Counsel for respondent, in a brief filed in this cause opposing the granting of a writ of certiorari, endeavored to show that the petition for the writ was not filed by petitioner within the time prescribed by statute. It is believed that the record herein, especially pages 42 and 51, demonstrates this contention to be sound, and it is again respectfully made, but for the sake of brevity the argument heretofore made will not be repeated except by reference to brief of respondent opposing the writ, pages 3 to 8 inclusive.

H.

The Due Process Clause of the Fourteenth Amendment does not Deny the Right to Virginia to Tax the Income of its Resident Beneficiary, even Though New York may have Taxed the Income of her Resident Trustees.[2]

The discussion under the due process clause logically falls in two divisions:

A. Virginia has inherent jurisdiction to impose a tax upon the entire net income of its residents, regardless of whether such income is derived from property located within or without the State.

B. The inherent jurisdiction of Virginia to impose a tax upon the entire net income of a resident of the State is not defeated, divested, or ousted by the fact the income is derived from a trust, the corpus of which is managed and administered in New York, and that such trust was so created as to subject the trustees to a New York tax upon the income therefrom.

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[2]Respondent's brief opposing the granting of a writ of certiorari contained a short discussion of the case upon its merits. However, counsel feeling that the argument should be somewhat elaborated, this brief is being filed, and for the convenience of the court the entire argument on the merits is incorporated herein.

A.

VIRGINIA HAS INHERENT JURISDICTION TO IMPOSE A TAX UPON THE ENTIRE NET INCOME OF ITS RESIDENTS, REGARDLESS OF WHETHER SUCH INCOME IS DERIVED FROM PROPERTY LOCATED WITHIN OR WITHOUT THE STATE.

Decisions of this court squarely support the above assertion. *Lawrence* v. *Mississippi*, 286 U. S. 276; *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308; *Shaffer* v. *Carter*, 252 U. S. 37; *Maguire* v. *Trefry*, 253 U. S. 12. As was said in *Shaffer* v. *Carter, supra:*

> "Income taxes are a recognized method of distributing the burdens of government, favored because requiring contributions from those who realize current pecuniary benefits under the protection of the government, and because the tax may be readily proportioned to their ability to pay. Taxes of this character were imposed by several of the states at or shortly after the adoption of the Federal Constitution"[3] (252 U. S. 51).

And later in the opinion at page 57:

> "As to residents, it may, and does, exert its taxing power over their income from all sources, whether within or without the state, * * *."

[3]Virginia's entrance into the field of income taxation was an early one. Stauffer in his work on "Taxation in Virginia" (The Century Company, 1931) says, at page 98, that evidences of an income tax are found as early as the Revolutionary period. Since 1869 the tax has been imposed on the entire net income (above the personal exemption) of its residents from all sources. In fact, the definition of income in the Act of 1869 (Acts of Assembly 1869-70, pp. 294, 355) closely parallels that contained in section 24 of the Tax Code of Virginia.

In *Lawrence* v. *Mississippi, supra*, the Mississippi net income tax upon its resident was upheld, although the base of the tax included "income derived wholly from activities carried on outside the state," the opinion holding that:

> "The obligation of one domiciled within a state to pay taxes there, arises from the unilateral action of the state government in the exercise of the most plenary of sovereign powers, that to raise revenue to defray the expenses of government and to distribute its burdens equably among those who enjoy its benefits. Hence, domicile in itself establishes a basis for taxation. Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable from the responsibility for sharing the costs of government. * * * The Federal Constitution imposes on the states no particular modes of taxation and apart from the specific grant to the federal government of the exclusive power to levy certain limited classes of taxes and to regulate interstate and foreign commerce, it leaves the states unrestricted in their power to tax those domiciled within them so long as the tax imposed is upon property within the state or on privileges enjoyed there, and is not so palpably arbitrary or unreasonable as to infringe the Fourteenth Amendment * * *" (286 U. S. 279)

New York ex rel. Cohn v. *Graves, supra*, sustained the net income tax of New York imposed on its resident although included in the income taxed were rents received from New Jersey real estate. This court there said:

> "Here the subject of the tax is the receipt of income by a resident of the taxing state, and is within

its taxing power, even though derived from property beyond its reach" (300 U. S. 316).

So in *Maguire* v. *Trefry, supra,* closely analogous here on the facts, Massachusetts' tax on its resident's income from bonds held in trust and administered in another State was upheld.

"That the receipt of income by a resident of the territory of a taxing sovereignty is a taxable event is universally recognized. Domicil itself affords a basis for such taxation. Enjoyment of the privileges of residence in the state and the attendant right to invoke the protection of its laws are inseparable from responsibility for sharing the costs of government. 'Taxes are what we pay for civilized society,' see *Compania General de Tabacos* v. *Collector,* 275 U. S. 87, 100. A tax measured by the net income of residents is an equitable method of distributing the burdens of government among those who are privileged to enjoy its benefits. The tax, which is apportioned to the ability of the taxpayer to pay it, is founded upon the protection afforded by the state to the recipient of the income in his person, in his right to receive the income and in his enjoyment of it when received. These are rights and privileges which attach to domicil within the State. To them and to the equitable distribution of the tax burden, the economic advantage realized by the receipt of income and represented by the power to control it, bears a direct relationship * * *" (300 U. S. 312, 313).

The above quoted language from *New York ex rel. Cohn* v. *Graves, supra,* substantially adopted in the opinion of the court below (R. p. 47), admirably sums up the reasons for sustaining the tax here challenged.

Petitioner contends in the face of these decisions that Virginia's income tax is in effect a direct tax on the property located in New York and, therefore, invalid because imposed on a subject beyond the jurisdiction of the State, citing *Senior* v. *Braden*, 295 U. S. 422; *Brushaber* v. *Union Pacific Railway Co.*, 240 U. S. 1; and *Pollock* v. *Farmers Loan & Trust Co.*, 157 U. S. 429. The cases cited do not support the contention made.

The tax in *Senior* v. *Braden, supra*, was not an income tax at all, but a property tax on real estate, and it has been very recently so described by this court in *New York ex rel. Cohn* v. *Graves, supra*, in these words:

> "In *Senior* v. *Braden, supra*, on which appellant relies, no question of the taxation of income was involved. By concession of counsel, on which the Court rested its opinion, if the interest taxed was 'land or an interest in land situate within or without the state,' the tax was invalid, and the Court held that the interest represented by the certificates subjected to the tax was an equitable interest in the land. Here (in *New York ex rel. Cohn* v. *Graves*) the subject of the tax is the receipt of income by a resident of the taxing state, and is within its taxing power, even though derived from property beyond its reach" (300 U. S. 316).

And in *Brushaber* v. *Union Pacific Railway Co., supra*, at pages 16, 17 of 240 U. S., this court said of *Pollock* v. *Farmers Loan & Trust Co., supra*, that "the conclusion reached in the *Pollock Case* did not in any degree involve holding that income taxes generically and necessarily came within the class of direct taxes on property." See, also, *New York ex rel. Cohn* v. *Graves*, 300 U. S. 308, 315.

Contrary also to the contention of petitioner, the court below, following its former decisions, has expressly held as to the nature of the challenged tax (R. p. 47):

> "But the tax here under review is of a different nature. In *Hunton* v. *Commonwealth*, 166 Va. 229, 244, 183 S. E. 873, we held that the Virginia income tax is an excise tax and not a property tax; that it is not a tax on the property from which the income is derived, a view subsequently settled in *People of the State of New York* v. *Graves, supra*.
>
> "In no sense is the Virginia income tax levied on any property beyond the jurisdiction of this State. It is a tax levied upon Mrs. Ryan measured by the net income received and enjoyed by her here. She is subject to this tax in Virginia because she resides and is domiciled in this State, because she enjoys the protection of the laws of this State in the receipt and enjoyment of this income, and because she should bear her proportionate part of the expense of the government which affords this protection to her."

The great weight of authority, as represented by decisions of State courts, joins in the view that a net income tax is to be classified as an excise. *Sims*, v. *Ahrens*, 167 Ark. 557; *Stanley* v. *Gates*, 179 Ark. 886; *Waring* v. *Savannah*, 60 Ga. 93, 100; *Featherstone* v. *Norman*, 170 Ga. 370, 379; *Diefendorf* v. *Gallet*, 51 Idaho 619, 627; *Miles* v. *Department of Treasury*, 209 Ind. 172; *Re Opinion of the Justices*, 133 Me. 525, 528; *Hattiesburg Grocery Co.* v. *Robertson*, 126 Miss. 34, 52; *Ludlow-Saylor Wire Co.* v. *Wollbrinck*, 275 Mo. 339, 351; *Bacon* v. *Ranson*, 331 Mo. 985, 990; *O'Connell* v. *State Board of Equalization*, 95 Mont. 91, 112; *Mills* v. *State Board of Equalization*, 97 Mont. 13, 17; *Maxwell*,

Commissioner v. *Kent-Coffey Mfg. Co.*, 204 N. C. 365, 371; *Appeal of Van Dyke*, 217 Wis. 528, 535; 4 Cooley on Taxation (4th Ed.), Sec. 1743.

Likewise this court has made quite clear the distinction between a direct tax on property and a tax on the net income from such property. *New York ex rel. Cohn* v. *Graves, supra*; *New York ex rel. Clyde* v. *Gilchrist*, 262 U. S. 94; *Brushaber* v. *Union Pacific Railway Co., supra.* See especially *Hale* v. *Iowa State Board of Assessment and Review*, ... U. S. ....., decided November 8, 1937, 82 L. Ed. 66, Adv. Ops., and the review of cases contained therein.

It is respectfully submitted that (laying aside the question of double taxation) not only reason and principle, but the decisions of this court directly in point, require that the challenged tax be held to be within the power of Virginia to impose.

B.

THE INHERENT JURISDICTION OF VIRGINIA TO IMPOSE A TAX UPON THE ENTIRE NET INCOME OF A RESIDENT OF THE STATE IS NOT DEFEATED, DIVESTED, OR OUSTED BY THE FACT THE INCOME IS DERIVED FROM A TRUST, THE CORPUS OF WHICH IS MANAGED AND ADMINISTERED IN NEW YORK, AND THAT SUCH TRUST WAS SO CREATED AS TO SUBJECT THE TRUSTEES TO A NEW YORK TAX UPON THE INCOME THEREFROM.

Petitioner denies the above assertion, the argument being that New York has the clear right to tax the trustees on account of the entire net income from the trust, and, having exercised that right, Virginia, therefore, is precluded from imposing a tax on its resident

beneficiary on account of the receipt of a part of the income from the trust. Virginia's tax is bad, says petitioner, because it would constitute double taxation of the same income and double taxation has been condemned by this court in *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194; *Frick* v. *Pennsylvania*, 268 U. S. 473; *Safe Deposit & Trust Co.* v. *Virginia*, 280 U. S. 83; *Farmers Loan & Trust Co.* v. *Minnesota*, 280 U. S. 204; *Baldwin* v. *Missouri*, 281 U. S. 586; *Beidler* v. *South Carolina*, 282 U. S. 1; and *First National Bank of Boston* v. *Maine*, 284 U. S. 312.

Respondent contends, on the other hand, that it may impose a tax on the entire net income of its resident, even though some of the income may come from property beyond its borders; that this right has been upheld by decisions of this court and that it is not to be denied merely because New York imposes a tax on the income of its resident trustees. Stated differently, due process should not be stretched so as to deny to Virginia the right to tax the net income of its resident for the protection it affords her person, her property, the receipt and enjoyment of her income and for the general advantages of living in the State as a citizen thereof simply because New York chooses to impose a tax on the same income in the hands of its resident trustees for the protection afforded them and the property handled by them.

Petitioner apparently urges that there is some magic in the term "double taxation" to strike down Virginia's tax. But this court has never said that double taxation *per se* is bad; in fact, it has said that the Fourteenth Amendment does not prohibit double taxation. *Cream of Wheat Co.* v. *Grand Forks County*, 253 U. S. 325, 330; *Coe* v. *Errol*, 116 U. S. 517, 524; *Fidelity & C.*

Trust Co. v. *Louisville*, 245 U. S. 54, 59. It has held in *Frick* v. *Pennsylvania, supra*, that due process prohibits the double taxation of tangibles, because they are only taxable by the jurisdiction in which physically located. And in the case of intangibles, *Safe Deposit & Trust Co.* v. *Virginia, supra, Farmers Loan & Trust Co.* v. *Minnesota, supra*, and kindred cases, double taxation has been prevented by the announced doctrine that, as a general rule, they are taxable only at the domicile of the owner. The conclusions of the court, however, in these cases have been based upon definitely announced legal principles and not upon a mere fiat against double taxation.

Virginia's income tax against Mrs. Ryan is not at all inconsistent with the principles laid down by this court relative to the taxation of intangibles. Income in a sense is an intangible and when paid to Mrs. Ryan it is an intangible owned by one domiciled in Virginia. Therefore, applying the rule, Virginia, the domicile of the owner, may tax this intangible.

Before any sweeping constitutional condemnation of double taxation is announced the meaning of that term should be precisely defined so that it may be readily determined whether any particular case comes within its scope. As between the States it is suggested that the ordinary and logical concept of double taxation is represented by a situation where the same legal entity is taxed by more than one State on account of the ownership of the same property or the exercise of the same privilege. The double taxation condemned in the cases relied on by petitioner falls within this concept. In *Union Refrigerator Transit Co.* v. *Kentucky, supra*, the exaction held bad was a tax levied by Kentucky upon tangible property permanently located in an-

other State and taxable there to the same owner. *Frick* v. *Pennsylvania* presents a case where two States imposed a tax on the same property for the same privilege —the testamentary transfer of tangible property. In *Safe Deposit & Trust Co.* v. *Virginia, supra,* identical intangibles were taxed by two States to the same trustee. Likewise, in *Farmers Loan & Trust Co.* v. *Minnesota, supra, Baldwin* v. *Missouri, supra, Beidler* v. *South Carolina, supra,* and *First National Bank of Boston* v. *Maine, supra,* the same intangibles were taxed by two States to the same estate on account of their passage from the dead to the living. But the theory now in effect advanced by petitioner is that, if two taxes levied by two States upon different persons for different privileges even reach the same economic interest, one of them must be condemned for the sole reason that it is "double". The situation in the case at bar is so entirely unlike that existing in any case relied on by petitioner, both factually and on principle, that it is not "double taxation" as that term has been used by this court or as it is generally understood. No prior decision of this court supports such a theory and it is submitted that it is an unsound principle of judicial decision.

Recent decisions of this court have made it plain that in the case of intangibles the validity of a tax thereon imposed by a particular State must depend upon whether there is a legitimate basis for the tax in the taxing State and not upon whether there may be or is a different and sufficient basis for a tax on the same intangibles in another State. Even the line of cases beginning with *Farmers Loan & Trust Co.* v. *Minnesota, supra,* distinctly anticipated the possibility of intangibles acquiring a taxable situs in more than one State. In that case it was said:

> "*New Orleans* v. *Stemple*, 175 U. S. 309; *Bristol* v. *Washington County*, 177 U. S. 133; *Liverpool, etc., Ins. Co.* v. *Board of Assessors for the Parish of Orleans*, 221 U. S. 346, recognize the principle that choses in action may acquire a situs for taxation other than at the domicile of their owner, if they have become integral parts of some local business. The present record gives no occasion for us to inquire whether such securities can be taxed a second time at the owner's domicile" (280 U. S. 213).

Wheeling Steel Corp. v. *Fox*, 298 U. S. 193, definitely recognized business situs acquired in a State other than the State of domicile of the owner as a basis for the taxation of intangibles. This case was followed by *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234, wherein was sustained Minnesota's tax on shares of bank stock having acquired a business situs in that State in spite of the argument advanced that the States of incorporation plainly had the right to lay a tax on the shares and had done so. The *First Bank Stock Corporation case* clearly foreshadowed the decision at the last term in *Schuylkill Trust Co.* v. *Pennsylvania*, ... U. S. ....., decided Jan. 3, 1938, 82 L. Ed. 291, Adv. Ops., wherein it was held that a State may tax the shares of a trust company incorporated therein "notwithstanding the ownership of the stock may also be a taxable subject in another State." Thus it is clear that the rule against double taxation on which petitioner principally relies is not an inexorable one even in the case of intangibles. There is still less reason for its application in the case of an income tax under the circumstances here present.

The validity of so-called double taxation of income has

never been before this court for determination. It is submitted, however, that, as has been said, the true test is whether there is a legitimate basis for the imposition of the challenged tax. If there is a legitimate basis for the tax, then it may be imposed and this basis is not made unsound by reason of what another State may do or because such other State may also have a legitimate basis for a tax imposed upon the same income. If there is no legitimate basis for the tax, then it may not be laid, and the fact that no other State taxes the income does not make good a basis which is otherwise bad. As was said by the court below, an analysis of the cases relied on by petitioner shows that each of them turns on the situs of the property taxed, and, where the situs was found to be beyond the jurisdiction of the taxing State, the tax was held to be invalid because there was no legitimate basis therefor. Surely, for the purpose of an excise tax, the situs of income is factually and legally at the domicile of the person who receives it, and this court has said that this is a legitimate basis for the imposition of a net income tax. It is of significance that the income from that part of the trust made available to Mrs. Ryan was payable to her in the sole discretion of the trustees; a part, all or none of the income may have been paid to her in any one year. Virginia has taxed not the whole income made available for her, but only that portion actually received and enjoyed in this State.

If *Lawrence* v. *Mississippi, supra,* and *New York ex rel. Cohn* v. *Graves, supra,* are to be allowed to stand, then Virginia has a legitimate basis for the imposition of its tax against Mrs. Ryan. It is true the record in those two cases did not disclose an income tax levied by any other than the State of domicile, but on principle

the conclusions would not have been different. Will Mississippi's tax, sustained in *Lawrence* v. *Mississippi*, *supra*, become invalid should Tennessee impose a tax (as this court has said in *Shaffer* v. *Carter*, *supra*, it may do) on Lawrence's income from business carried on in that State? Does the validity of New York's tax on the income of its resident from New Jersey real estate (sustained in *New York ex rel. Cohn* v. *Graves*, *supra*) rest upon the insecure foundation of whether or not New Jersey elects to tax such income? Not all of the States impose an income tax. If the validity of the tax upon its residents, otherwise good, of any one of the States that has adopted such a system of taxation is made to depend in any particular case upon the tax statutes of one or more of her sister States, the confusion and uncertainty which would result cannot be estimated. This is all the more obvious when consideration is given to the fact that business is now being transacted on an increasingly national scale.

This court has said that taxation is an intensely practical matter. *Farmers Loan & Trust Co.* v. *Minnesota*, *supra*. If only one state can tax income, a rule must be found by which the proper State can be determined. In the instant case, for example, the two taxes are imposed upon different legal entities for entirely different privileges and protection afforded under the laws of the two States. It is submitted that no principle of taxation nor any decision of this court supports priority in favor of New York. Indeed the cases relied on seem to be in favor of the priority of respondent. Certainly time of assessment should not control, although this record discloses no such priority for either State.

The effect of one phase of petitioner's argument is that income must be traced to its source and there only can it be taxed. Such a doctrine, directly in conflict with decisions of this court holding that the receipt of income by a resident of a State is a "taxable event" as is "universally recognized", must inevitably result in a serious disarrangement of the fiscal policies of the States and especially of those, like Virginia, where the income tax is a substantial source of revenue. Many illustrations of the effect of such a doctrine at once occur.

A Virginia stockholder of a corporation which carries on its business in another State and is taxed there on its income, receives dividends the source of which is, of course, the income of the corporation in such other State. To be consistent, petitioner must say that Virginia may not tax its resident on account of the receipt of these dividends from income which has previously been taxed. The income which Mrs. Ryan received in Virginia in the sole discretion of the trustees is closely analogous to dividends declared by the directors of a corporation and paid to the stockholders.

Again, a resident of Virginia owns stock listed on the New York Stock Exchange. This stock is sold at a profit on the Exchange in New York. The sale being made in New York, the source of the profit is there, and so petitioner would say Virginia cannot impose its income tax on this profit.

Likewise, a resident of one State may earn income from personal services rendered in another. Is the State of domicile to be denied its tax on this income where the source thereof is beyond its borders?

So, also, petitioner must contend that a State may not tax its residents upon income from business carried

on or property located in another State, and that *Lawrence* v. *Mississippi, supra,* and *New York ex. rel. Cohn* v. *Graves, supra,* should both be overruled.

So far as is practicable, the elimination of duplicate taxation of income is manifestly an end to be desired. But this advantageous economic result should not be accomplished by the abandonment of constitutional principles firmly established by prior decisions of this court. It is a matter which should be left to the legislatures of the several States. Virginia has gone far in this direction. Not only do its laws provide a credit under prescribed conditions for income taxes paid other States by its residents (section 39 of Tax Code of Virginia, printed in an Appendix hereto), but they also allow a credit for income taxes paid other States by non-residents who may receive income from Virginia sources. See section 40 of Tax Code of Virginia, also printed in the Appendix. Many other States imposing income taxes have statutes substantially similar to one or both of these Virginia statutes. New York, for example, grants a credit similar to that granted by section 40 of the Virginia Tax Code. Section 363 of New York Tax Laws, Laws of New York, 1921, Chapter 477. Therefore, if New York had taxed *Mrs. Ryan* as a non-resident on account of income she received from the trust, that State would have allowed credit on its tax for the tax paid to Virginia as a resident on the same income. However, *Mrs. Ryan* paid no tax to New York (the tax being laid there on the trustees), and in this particular case the facts were not such as to invoke the reciprocity provisions.

It is respectfully submitted that a net income tax by its nature is in a class by itself and that there is no basis for holding that taxation of income at the domi-

cile of the recipient is within the purview of the rule that tangibles located outside the State of the owner are not subject to taxation within it; nor, due to the nature of the two taxes here involved and the different privileges and protection for which they are imposed, do they come within the scope of the principles pronounced by this court in striking down the double taxation of intangibles. But, irrespective of the validity of the New York tax, the basis of the Virginia tax is the domicile of the recipient of the income, and it is imposed for the protection that she receives under its laws. This court has said that this is a legitimate basis for the tax. Due process of law does not require that this legitimate basis be held bad for the sole reason that another State exercises its right (but not a superior one) to impose a tax upon a different taxpayer for different privileges, using in part the same measuring stick.

III.

Denial of the Equal Protection of the Laws was not Raised or Considered in the Court Below and Should not now be Considered by this Court. In Any Event, Petitioner is not Denied the Equal Protection of the Laws.

A.

DENIAL OF THE EQUAL PROTECTION OF THE LAWS WAS NOT RAISED OR CONSIDERED IN THE COURT BELOW AND SHOULD NOT BE CONSIDERED FOR THE FIRST TIME IN THIS COURT.

On page 24 of brief in support of the petition for a writ of certiorari counsel for petitioner alleges that the

Virginia tax is invalid because denying Mrs. Ryan the equal protection of the laws contrary to the provisions of the Fourteenth Amendment. This question has not been previously raised or considered in this case. It does not appear in the record and the lower court did not pass upon it.

In the court below the only Federal question was presented by counsel for petitioner in the following manner (R. p. 15):

> "Second. The assessment here if justified under the Virginia law would be contrary to the provisions of the Fourteenth Amendment to the Federal Constitution.
>
> "The Fourteenth Amendment is what is usually referred to as the Due Process Clause. This point depends upon Federal decisions and the *situs* of the income for taxation purposes."

The only Federal question raised and certainly the only Federal question considered or decided appears from the lower court's opinion (R. p. 49) from which the following is quoted:

> "What we do decide and all we decide is that the domicile and residence of Mrs. Ryan in the State of Virginia is sufficient to sustain the validity of the tax levied against her by this State."

The opinion of the lower court showed the issues to be, on page 43 of the Record, as follows:

> "Relief from the taxes is sought on two grounds:
>
> "(1) The Virginia statutes are not designed and intended to tax such income; and

"(2) If the tax is within the Virginia statutes the assessment violates the due process clause of the Fourteenth Amendment to the Federal Constitution."

Hence this court should not consider the question now.

Saltonstall v. *Saltonstall*, 276 U. S. 260, 268;
Silver v. *Silver*, 280 U. S. 117, 122;
Northwestern Bell Telephone Co. v. *Nebraska State Ry. Commission*, 297 U. S. 471, 473;
Susquehanna Power Co. v. *State Tax Comr. of Maryland*, 283 U. S. 291, 297;
Aero Mayflower Transit Co. v. *Georgia Public Service Comn.*, 295 U. S. 285, 294.

B.

IN ANY EVENT THE VIRGINIA TAX DOES NOT DENY TO PETITIONER THE EQUAL PROTECTION OF THE LAW.

While it is difficult to follow petitioner's rather vague and involved argument as it is found on pages 24 and 25 of its brief, apparently the point is made that the New York and Virginia laws with respect to estates are similar; that, if the trust in question had been a Virginia trust, both Mrs. Ryan and the trustees would have been subject to a Virginia tax on the same income; but that, if Mrs. Ryan had been an "ordinary beneficiary", she would not have been subjected to this double tax whether she received the income from a New York trust or from a Virginia trust.

The short answer to this argument that is sufficient is simply that this court does not deal in hypothetical cases and there is no such case in reality before the court

now. *Roberts & Schaefer Co.* v. *Emmerson*, 271 U. S. 50, 54.

In order to show the imaginary discrimination, counsel invokes a construction of the Virginia statutes dealing with the taxation of estates and trusts *all his own*. The court below has not so construed the statutes and counsel point to no decision of any Virginia court so construing them. While it does not appear that a discussion of what would have happened if this had been a Virginia trust has the slightest bearing on any issue involved here, yet, if this had been the case and the payment of the income to the beneficiary was in the discretion of the trustee, the income tax would have been paid by the trustee and not by the beneficiary; but if the payment of the income was required by the terms of the trust to be made to the beneficiary, Mrs. Ryan, periodically, without discretion in the trustees, the tax thereon would be paid by the beneficiary and not by the trustee. See section 50 of the Tax Code of Virginia, Michie's Code of Virginia, 1936, p. 2410, printed in the Appendix. In short, if a Virginia trust were involved, only one tax would be imposed on the income therefrom, payable in the case of a "discretionary trust" by the trustee, and in the case of an "ordinary trust" by the beneficiary.

It is entirely clear that Mrs. Ryan and all persons similarly situated are taxed alike under Virginia law, and there is nothing in this record or the statutes to show the denial of the equal protection of the laws.

CONCLUSION

For the reasons advanced it is respectfully submitted that:

(1) The writ of certiorari should be dismissed because the petition was not filed within the time required by law; and

(2) No right, title, privilege or immunity under the Fourteenth Amendment of the Constitution of the United States has been denied to petitioner.

Respectfully submitted,

ABRAM P. STAPLES,
Attorney General of Virginia,
W. W. MARTIN,
Assistant Attorney General.
Counsel for Respondent.

Richmond, Virginia,
September 15, 1938.

APPENDIX

TAX CODE OF VIRGINIA

"Sec. 24. Definition of gross income.—The term 'gross income', as used herein, includes gains, profits and income derived from salaries, wages or compensation for personal services of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales or dealings in property, whether real or personal, growing out of the ownership, or use, or interest in such property; also from rent, interest, dividends, securities or transactions of any business carried on for gain or profit, or gains or profits and income derived from any source whatever, including gains or profits and income derived through estates or trusts by the beneficiaries thereof, whether as distributive or as distributable shares. * * *" (Michie's Code of Virginia, 1936, p. 2404).

"Sec. 27. Net income defined.—The term 'net income' means the gross income of a taxpayer less the deductions allowed by this chapter; but the net income subject to the taxes imposed by this chapter shall be the net income less the personal exemptions allowed by this chapter." (Michie's Code of Virginia, 1936, p. 2405).

"Sec. 38. Individual income tax rates; residents and nonresidents.—A tax is hereby annually levied for each taxable year upon every resident individual of this State, upon and with respect to his entire net income as herein defined for purposes of taxation, at rates as follows:

"One and one-half per centum of the amount of such net income not exceeding three thousand dollars;

"Two and one-half per centum of the amount of such net income in excess of three thousand dollars, but not in excess of five thousand dollars; and

"Three per centum of the amount of such net income in excess of five thousand dollars. * * *" (Michie's Code of Virginia, 1936, p. 2407).

"Sec. 39. Credit for taxes paid other States by resident individuals of this State.—Whenever a resident individual of this State has become liable to income tax to another State upon his net income, or any part thereof, for the taxable year, derived from sources without this State and subject to taxation under this chapter, the amount of income tax payable by him under this chapter shall be credited on his return with the income tax so paid by him to such other State upon his producing to the proper assessing officer satisfactory evidence of the facts and of such payment. The credit provided for by this section shall not be granted to a taxpayer when the laws of another State, under which the income in question is subject to tax assessment, provide for a credit to such taxpayer substantially similar to that granted by section forty of this chapter. * * *" (Michie's Code of Virginia, 1936, p. 2408).

"Sec. 40. Credit for taxes paid other States by nonresident individuals.—Whenever a nonresident individual of this State has become liable to income tax to the State where he resides upon his net income for the taxable year, derived from sources within this State and subject to taxation under this chapter, the amount of income tax payable by him under this chapter shall be credited with such proportion of the tax so payable by him to the State where he resides as his income subject to taxation under this chapter bears to his entire income, upon

which the tax so payable to such other State was imposed; provided, that such credit shall be allowed only if the laws of said State (1) grant a substantially similar credit to residents of this State subject to income tax under such laws or (2) impose a tax upon the personal incomes of its residents derived from sources in this State and exempt from taxation the personal incomes of residents of this State. No credit shall be allowed against the amount of the tax on any income taxable under this chapter which is exempt from taxation under the laws of such other State." (Michie's Code of Virginia, 1936, p. 2408).

"Sec. 50. Estates and trusts.—1. The tax imposed by this chapter upon individuals shall apply to estates and trusts, which tax is hereby levied annually upon and with respect to the income of estates or of any kind of property held in trust, including:

* * * * * *

"d. Income which is to be distributed to the beneficiaries periodically, whether or not at regular intervals, * * *.

* * * * * *

"3. In cases under paragraphs a, b and c of subdivision one, of this section, the tax shall be imposed upon the estate or trust with respect to the net income of the estate or trust and shall be paid by the fiduciary, * * *. In such cases, the estate or trust shall be allowed the same exemption as is allowed to single persons by this chapter, and in such cases an estate or trust created by a person not a resident, and an estate of a person not a resident shall be subject to tax only to the extent to which individuals other than residents are liable under this chapter.

"4. In cases under paragraphs d and e of subdivision one of this section, if the distribution of

income is in the discretion of the fiduciary, either as to the beneficiaries to whom payable or as to the amounts to which any beneficiary is entitled, the tax shall be imposed upon the estate or trust in the manner provided in subdivision three of this section, but without the deduction of any amounts of income paid or credited to any such beneficiary. In all other cases under paragraphs d and e of subdivision one of this section, the tax shall not be paid by the fiduciary, but there shall be included in computing the net income of each beneficiary his distributive share, whether distributed or not, of the net income of the estate or trust for the taxable year, * * *." (Michie's Code of Virginia, 1936, p. 2410).

pp. 1 - 2

SUPREME COURT OF THE UNITED STATES.

No. 9.—October Term, 1938.

Guaranty Trust Company of New York, Executor of the Estate of Mary T. Ryan, Deceased, Petitioner, vs. Commonwealth of Virginia.

On Writ of Certiorari to the Supreme Court of Appeals of Virginia.

[November 7, 1938.]

Mr. Justice McReynolds delivered the opinion of the Court.

Mrs. Mary T. Ryan, while resident and citizen of Virginia in 1930, 1931 and 1932, was beneficiary of a trust set up under the will of her husband, Thomas F. Ryan, who died when a citizen of New York in 1928. The will was probated in New York; the trustees qualified there, took over the assets and have kept them there. The trust has been administered and accounts settled under the laws of that state.

The will divided the estate into fifty-four parts and directed payment of the income therefrom to designated beneficiaries. These are the provisions presently important—

> Twelve (12) of said equal parts to said Trustees in trust to receive the income therefrom, and to pay over such part of said income to my dear wife, Mary T. Ryan, as they in their sole discretion may determine to be necessary and proper for her care, support and comfort during her life, in such installments and at such intervals as they in their sole discretion may determine.

The will further provided that the trustees should "divide any surplus income from said twelve parts not paid to my wife as aforesaid, into forty-two equal portions, and to pay such surplus income in equal quarterly payments as near as may be" to certain distributees as designated in said will, and that upon the death of the said wife the principal amount of the said twelve equal parts should be divided and distributed to certain designated distributees, as set out in said will.

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The New York and Virginia statutes laying taxes upon incomes from trusts are substantially alike. They require trustees to report income received and where the trust is discretionary to pay the amount assessed upon the entire income; if the trust is an ordinary one each beneficiary is assessed upon the amount received by him.

For 1930, 1931 and 1932 New York in one or both of these ways received taxes upon the entire income of the trust set up under the will. Exercising their discretion, after satisfying the taxes, the trustees paid to Mrs. Ryan considerable sums out of the income, from twelve fifty-fourths of the estate—in all approximately $300,000. For the same years Virginia assessed ordinary state income taxes against her on account of the sums so received. They were paid and this proceeding was begun in the circuit court of Nelson County to recover them. It sustained the tax and the highest court of the state affirmed the judgment. The matter comes here by certiorari granted upon the following statement—

> This petition presents the issue as to whether the State of Virginia has the right, under the provisions of the Fourteenth Amendment to the Constitution of the United States, to assess an income tax on income received by the said Mary T. Ryan for the years in question, when the identical income in the hands of her Trustees had been assessed with income taxes by the State of New York, and which said taxes had been paid there, thus imposing two State taxes on the same income.

Counsel for petitioner submits—.

The same income was subjected to taxation by two states. New York unquestionably had the right to exact the tax upon the income of the trust, and thereby Virginia was inhibited. The provisions of the Fourteenth Amendment protect against such taxation by two states on the same income. Here, both the Equal Privilege and the Due Process clauses forbid the challenged exactment.

The claim that equal protection has been denied seems to rest upon an assumed literal construction of the Virginia statute which would require income from discretionary trusts to be taxed against both trustee and beneficiary, while only one tax (against the beneficiary) would fall upon income from ordinary trusts.

We must, of course, deal with rights here actually involved. The ate has made one assessment against a resident beneficiary be- use of inco received within her jurisdiction and her courts ve approved. They have not interpreted her statutes according the petitioner's assumption.

The right to recognize a distinction between ordinary and dis- etionary trusts and thus insure collection of taxes upon the entire come actually received from the latter seems clear enough.

Has there been denial of Due Process—

The insistence is that the challenged assessment was upon the entical income already rightly taxed by New York; that under merous decisions by us two or more states may not tax the me subject; this would amount to double taxation and infringe e Due Process clause. To support this proposition the cases oted in the margin[1] are cited.

Those cases go upon the theory that the taxing power of a state restricted to her confines and may not be exercised in respect of bjects beyond them. Here, the thing taxed was receipt of in- me within Virginia by a citizen residing there. The mere fact at another state lawfully taxed funds from which the payments ere made did not necessarily destroy Virginia's right to tax mething done within her borders. After much discussion the pplicable doctrine was expounded and applied in *Lawrence* v. *tate Tax Commission*, 286 U. S. 276, and *New York ex rel. Cohn* v. *raves*, 300 U. S. 308. The attempt to draw a controlling distinc- on between them and the present cause, we think has not been uccessful.

The challenged judgment must be

Affirmed.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[1] Union Refrigerator Co. v. Kentucky, 199 U. S. 194, Frick v. Pennsylvania, 68 U. S. 473, Safe Deposit & Trust Co. v. Virginia, 280 U. S. 83, Farmers oan & Trust Co v. Minnesota, 280 U. S. 204, Baldwin v. Missouri, 281 U. S. 86, Beidler v. S. Carolina Tax Commission, 282 U. S. 1, First National Bank f Boston v. Maine, 284 U. S. 312, Senior v. Braden, 295 U. S. 422.